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IN THE

Supreme Court of the United States

OCTOBER TERM 1993

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF THE NEW YORK and JOHN BORDEN,

Petitioners,

- vs. -

SHARON KARIBIAN and MARK URBAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals for the Second Circuit failed to follow the standards enunciated by this Court in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986) regarding sexual harassment in the workplace?

II. Whether an employer is absolutely liable pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, for a "hostile environment" that allegedly arose from a supervisor's conduct, where the employer has a policy specifically against sexual harassment and effective procedures available to complainants that provide prompt, remedial action?

III. Whether an employer is absolutely liable pursuant to Title VII under a "*quid pro quo*" theory where an employee, who did not suffer any job or economic detriment and received every promotion and raise based on merit, alleges submission to a supervisor's sexual advances notwithstanding the admitted existence of the employer's express policy against sexual harassment and procedures available that resulted in prompt, remedial action?

IV. Whether an employer's express policy against sexual harassment and effective available procedures are factors to be considered in determining employer liability pursuant to Title VII for a supervisor's alleged sexual harassment?

LIST OF PARTIES

The names of all parties to the proceeding in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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THE TRUSTEES OF COLUMBIA UNIVERSITY
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SHARON KARIBIAN and MARK URBAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The Trustees of Columbia University in The City of New York ("Columbia University" or the "University"), petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the decision and judgment dated January 25, 1994 in *Karibian v. Columbia University, et al.*, No. 93-7188.

OPINIONS BELOW

The Opinion of the District Court for the Southern District of New York dated February 2, 1993 in 91 CV 3135 (TPG) (Griesa, J.), awarding summary judgment to Columbia University on respondent

Sharon Karibian's sexual harassment claims pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq.*, is reported at 812 F. Supp. 413 (S.D.N.Y. 1993) and is reproduced in the Appendix filed herewith ("App.") at A17.

The Opinion and Judgment of the Court of Appeals filed on January 25, 1994, No. 93-7188 (Mahoney, J. and McLaughlin, J., of the United States Court of Appeals for the Second Circuit, and Heaney, J., of the Eighth Circuit sitting by designation), reversing the judgment of the District Court and remanding this case, is reported at 14 F.3d 773 (2d Cir. 1994), and is reproduced at App. A1.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

The judgment sought to be reviewed was entered on January 25, 1994.

STATUTES INVOLVED

Pertinent provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* (1993) ("Title VII") are reproduced at App. A29.

STATEMENT OF THE CASE

In reversing the District Court, the Court of Appeals placed the Second Circuit in conflict with this Court's prior directives in *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986) that (a) employers are not always absolutely liable for a supervisor's alleged sexual harassment, and (b) an employer's specific policy against sexual harassment and effective procedures to provide prompt,

remedial action are "plainly relevant". *Id.* at 72. Notwithstanding this Court's clear statement in *Vinson* that the Court of Appeals for the District of Columbia "erred in concluding that employers are always automatically liable for sexual harassment by their supervisors" (*Id.* at 72), the Second Circuit Court of Appeals, in conflict with this Court and other Circuits, adopted a standard of absolute liability. The Court of Appeals held the employer in this case could be liable regardless of the absence of notice and the reasonableness of Columbia University's complaint procedures, based on both a hostile environment theory and a *quid pro quo* theory. Here, the employee, Sharon Karibian, claims she was compelled to submit to sexual advances by her supervisor, Mark Urban. She admits, however, that she did not suffer any economic detriment, that her raises and her promotions were on merit, and that once she made a complaint to her employer, she was promptly insulated from the alleged harasser, an investigation was commenced and the supervisor was asked to, and did, resign.

A. Facts

Respondent Sharon Karibian, while a part time adult student at Columbia University's School of General Studies, became a part time clerical worker in 1986 at the "Telefund at Columbia". This fund-raising program was under the aegis of Columbia University's Office of University Development and Alumni Relations ("UDAR"), but was designed and administered by an outside consultant, Philanthropy Management, Inc. ("PMI"). (App. at A18) By the Fall of 1989, Karibian had progressed from clerical worker to Assistant Project Director to Project Director, the highest position at the Telefund at Columbia University. (App. at A5) Each of her raises and promotions was based solely on merit.

In the Spring of 1987, prior to respondent Mark Urban's employment by Columbia University, Karibian who was 29 years old at the time, met Urban who was 26. (App. at A18) It is

undisputed that sometime thereafter they had a sexual relationship. He claims it was welcomed and consensual; she now claims it was unwelcome.[1]

In September 1987, Urban became employed at Columbia University at UDAR. It was not until the Fall of 1989 when Karibian became Project Director of Telefund at Columbia University that Urban became her direct supervisor.

On January 30, 1990, Karibian went to the Director of Development Services at UDAR and complained that Urban was undermining her in her job as Project Director of Telefund at Columbia University since her sexual relationship with Urban had ended.[2] (App. at A20) As a result, Columbia University promptly removed Urban as Karibian's supervisor to insulate her from him, and commenced an investigation into her sexual harassment claims, during which Urban was asked to, and did, resign. (App. at A23)

Since 1981, Columbia University has maintained an effective mechanism for dealing with sexual harassment which is communicated to the University community through its "Protection Against Sexual Harassment" publication, among others. This mechanism includes Columbia University's express Policy Against Sexual Harassment which contains the unequivocal declaration that "the University prohibits sexual harassment of any member of the Columbia community." (App. at A18) The University's procedures are also clearly set forth and describe the various avenues

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[1] In the District Court and Court of Appeals, Columbia University's motion for summary judgment was based on the undisputed facts and Karibian's own deposition testimony. In each of those courts and herein, Columbia University continues to reserve its rights to contest the "facts" as alleged by Karibian.

[2] She did not tell this UDAR representative any details of her relationship with Urban and never mentioned any allegations of violence.

available to the University community if a person believes he or she is being sexually harassed. The procedures include counseling, mediation, investigation and formal grievance procedures. Members of the University can select the type of procedures best suited to their needs. These services are available through (1) any one of the twenty-six members of the University's Panel on Sexual Harassment (a "Panel Member"), (2) the Office of Equal Opportunity and Affirmative Action ("EOAA Office"), or (3) by utilizing University grievance procedures. (App. at A18-19) Communications with a Panel Member or the EOAA Office are kept confidential unless confidentiality is waived by the complainant. (App. at A19)

Karibian does not contest that the Policy and procedures exist. She also admits that she utilized confidential procedures in 1988, and she admits that when she voiced her complaint and waived confidentiality in 1990, Columbia University promptly insulated her, investigated the situation and obtained Urban's resignation.

B. Proceedings Below

In 1990, Karibian filed suit against Columbia University, John Borden[3] and Mark Urban, amending her complaint in 1991 to invoke Title VII on which jurisdiction of the District Court and Court of Appeals was based. After discovery, in June 1992, the University moved for summary judgment.

The District Court reviewed the deposition transcripts and undisputed facts, and awarded summary judgment in favor of Columbia University on Karibian's Title VII claims. That court recognized that a Title VII sexual harassment claim could be based

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[3] Beginning in April 1988, John Borden became Urban's supervisor when Borden joined Columbia University as Deputy Vice President of UDAR.

on theories of "*quid pro quo*" or "hostile environment". (App. at A20)

The District Court held that in order to prevail on a *quid pro quo* theory, a plaintiff must show an actual — rather than threatened — economic loss because a sexual advance was made and rejected. The District Court found that Karibian was not denied any economic benefit, but rather, enjoyed promotions and raises. Accordingly, the District Court held she could not succeed on a *quid pro quo* theory. (App. at A20-21)

The District Court also recognized that this Court has not established a definitive rule for employer liability regarding a "hostile environment" claim. Rather, as the District Court noted, lower courts were directed to draw from traditional agency principles, whereby a plaintiff must prove "the employer either provided no reasonable avenue of complaint or knew of the harassment but did nothing about it." (App. at A21) Upon reviewing the undisputed evidence, the District Court concluded that "[t]here is no basis for any contention that Columbia University failed to provide a reasonable avenue for making complaints" (App. at A21) and the first time Karibian made such a complaint in 1990, Columbia University took "prompt and effective remedial action." (App. at A23)

The Court of Appeals reversed the judgment below and ordered the case remanded for further proceedings. (App. at A16) That Court held that where a complainant "submits" to a supervisor's alleged sexual advances, an employer is strictly liable for the supervisor's conduct where (a) the supervisor makes implicit threats, even if such threats are not carried out and are against the employer's stated policy, and/or (b) the supervisor uses the employee's acceptance of his advances as the basis for a decision affecting the compensation, terms, conditions or privileges of the employee's job. (App. at A10) Thus, the Court of Appeals abrogated the requirement, as uniformly articulated by other

Circuits in "refusal" cases, that a plaintiff prove an economic or job related loss before an employer will be held strictly liable.

The Court of Appeals also held that Columbia University could be absolutely liable for the supervisor's alleged conduct on a "hostile environment" theory regardless of "the absence of notice or the reasonableness of Columbia's complaint procedures." (App. at A14) Thus, in conflict with this Court and every other Circuit Court to address "hostile environment", the Second Circuit Court of Appeals disregarded Columbia University's policy and effective procedures, and found that Columbia University could be held liable for a "hostile environment" allegedly arising from a supervisor's conduct.

REASONS FOR ALLOWING THE WRIT

This case involves important issues of federal employment discrimination law that should be settled by this Court. Central to this case is the legal standard of employer liability for alleged supervisor harassment and the role of an employer's specific policy against sexual harassment and procedures for prevention and prompt remedial action. The Second Circuit Court of Appeals cast aside the employer's policy and procedures, and ignored this Court's prior admonition in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986), against holding an employer absolutely liable for supervisor conduct. By adopting this absolute standard for both hostile environment claims and *quid pro quo* claims, the Court of Appeals placed the Second Circuit in conflict with this Court and the other Circuits.

The Court of Appeals decision will have wide impact, and the issues raised herein will affect employees and employers throughout the nation. As people at all levels in the workplace struggle to find the correct balance between prevention and remedial action concerning claims of sexual harassment on the one hand, and

interference with individuals' purely personal relationships on the other, it is imperative that employees and employers understand their rights and obligations under Title VII and the role of effective policy and procedures concerning sexual harassment. In addition, the issues herein can be expected to continue to arise frequently throughout the federal court system.

I

THE COURT OF APPEALS DECISION CONFLICTS WITH SUPREME COURT PRECEDENT

This Court in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986), held that employers are not always absolutely liable for alleged supervisor harassment, and recognized that an employer's policy and effective procedures (as well as an employee's failure to invoke them) are "plainly relevant". *Vinson*, 477 U.S. at 72. In that case, this Court acknowledged Congress' intent to "place some limits" on employer liability under Title VII for acts of supervisors and employees. *Id.*

The facts in *Vinson* and this case are strikingly similar. For example, in *Vinson*, as here, the employee had received all raises and promotions on merit (*Vinson*, 477 U.S. at 60; *Karibian*, App. at A20-21); and there, as here, an employee claimed she submitted to her supervisor's alleged sexual advances out of fear of losing her job. (*Vinson*, 477 U.S. at 60; *Karibian*, App. at A5, A10.)

A significant difference between this case and *Vinson* is that here, unlike the employer in *Vinson*, Columbia University had a specific policy against sexual harassment and effective procedures that resulted in prompt remedial action.[4] The Court of Appeals,

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[4] In *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993), this Court was again

however, ignored the role of this policy and procedures, and created a standard of absolute employer liability for alleged supervisor conduct in hostile environment claims. This holding places the Second Circuit in conflict with this Court's holding in *Vinson*.

The Court of Appeals' holding concerning Karibian's *quid pro quo* claim is also contrary to *Vinson*. That case, like this one, was a submission case in which the employee obtained all raises and promotions on merit. Accordingly, the courts, the Equal Employment Opportunity Commission and the litigants did not view *Vinson* as a *quid pro quo* case. In this case, the District Court, like the courts in *Vinson*, treated Karibian's claim as a hostile environment one rather than a *quid pro quo* claim. Nonetheless, the Court of Appeals, contrary to *Vinson*, found that Karibian could state a *quid pro quo* claim even though she did not suffer any economic detriment and all raises and promotions were on merit.

The Court of Appeals also ignored agency principles. Where, as here, there is no evidence that the supervisor used any actual authority to accomplish the alleged harassment, the only basis to hold an employer liable would be apparent authority. Yet, it is well recognized that "an employer can divest its supervisors of this apparent authority by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure." Equal Employment Opportunity Commission ("EEOC") Policy Guidance on Current Sexual Harassment Issues, 8 Fair Empl. Prac. Manual (BNA) 405:6681 (Mar. 19, 1990) (hereinafter "EEOC

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presented with a situation where, unlike here, the employer lacked effective procedures. In that case, this Court noted that for hostile environment claims, there is not a "mathematically precise test." *Id.* at 371. Rather, liability can be determined "only by looking at all the circumstances" and relevant factors. *Id.*

Policy").[5] In short, there is a role for an employer's policy and procedures, and employer liability is not absolute.

Thus, in this case, the Court of Appeals for the Second Circuit has done exactly what the Court of Appeals for the District of Columbia Circuit had done in *Vinson*, which led this Court to conclude that "the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case." *Vinson*, 477 U.S. at 73. As a result, the Court of Appeals in this case has placed the Second Circuit in conflict with this Court.

II

THERE IS A CONFLICT IN THE CIRCUITS

A. Hostile Environment

By adopting a legal standard of absolute liability, the Court of Appeals has also placed the Second Circuit in conflict with all of the other Circuits that have considered hostile environment claims. Each of the other Circuits has looked to whether the employer knew or should have known of the alleged harassment, and whether the employer had a policy and effective procedures designed to allow for prompt, remedial action. *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir. 1987); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989); *Juarez v.*

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[5] "If an employee failed to use an effective, available complaint procedure, the employer may be able to prove the absence of apparent authority and thus the lack of an agency relationship...". EEOC Policy, 8 Fair Empl. Prac. Manual (BNA) 405:6697-98.

Ameritech Mobile Communications, Inc., 957 F.2d 317 (7th Cir. 1992); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984); *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572 (10th Cir. 1990); and *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989).[6]

Each of the other Circuits has considered an employer's procedures and prompt remedial action, or lack thereof, as relevant factors in determining employer liability. For example, in *Steele*, while the supervisor/harasser was held liable for damages for hostile environment harassment, the Eleventh Circuit reviewed the prompt remedial action taken by the employer and affirmed the District Court's holding that the employer was not liable. *Steele*, 867 F.2d at 1316-17. *See also Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993) (summary judgment for employer affirmed where employer's prompt remedial action stopped the offensive conduct by a supervisor), and *Carmon v. Lubrizol Corp.*, No. 92-2964, 1994 U.S. App. LEXIS 5956, at *13 (5th Cir. 1994) (to hold a company liable after taking prompt remedial action "would produce truly perverse incentives benefiting no one, least of all actual or potential victims of sexual harassment."). Similarly, in *Sparks v. Pilot Freight Carriers, Inc.*, 830 F. 2d 1554 (11th Cir. 1987), which involved both hostile environment and *quid pro quo* claims, that Court of Appeals acknowledged this Court's guidance in *Vinson* that an employer could shield itself from Title VII liability through policy and procedures that divest a supervisor of actual or apparent authority. In *Sparks*, however, that employer had "proffered no evidence that it had either a policy against sexual harassment or an effective grievance procedure." *Id.* at 1560.

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[6] Prior to the panel's decision in this case, decisions of the Second Circuit appeared to be in accord with this standard. *See Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989).

In short, each of the other Circuits, whether in a supervisor or co-employee case, has followed this Court's admonition against absolute liability. In determining whether an employer could be held liable in addition to the alleged harasser, each of those courts considered whether the employer had a policy and effective procedures. In contrast, by holding that an employer could be found liable for a hostile environment claim "regardless of the absence of notice or the reasonableness of Columbia's complaint procedures" (App. at A14), the Court of Appeals put the Second Circuit in conflict with other Circuits.

B. *Quid Pro Quo*

The Court of Appeals also put the Second Circuit in conflict with other Circuits regarding analysis of *quid pro quo* claims. An employer's policy and procedures and agency principles are also relevant in *quid pro quo* cases as shown by decisions of other Circuits. In those cases in which an employer was held liable, the employer lacked effective procedures, and the employee suffered economic detriment in refusing a supervisor's sexual advances. Thus, the supervisor exercised actual authority in taking away a tangible job benefit. *See, e.g., Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990) (where the President was the supervisor/harasser to whom the employee would have to complain, thus demonstrating the lack of effective procedures); and *Jones v. Wesco Invs. Inc.*, 846 F.2d 1154 (8th Cir. 1988) (a constructive discharge case where the President was the actual harasser, and effective procedures were clearly lacking). *See also Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988) (lack of effective procedures resulted in discharge of medical resident).

In typical "refusal" cases, an employee is deprived of an economic job benefit for refusing a supervisor's sexual advances. A strict liability standard evolved in "refusal" cases because the employer gave the supervisor the actual authority to deprive the

employee of an economic benefit. Thus, agency principles appropriately put the loss on the employer.

Absent economic loss, however, the reason for the rule of strict liability disappears. Rather, agency principles govern, whether the case is one for hostile environment, *quid pro quo*, or both. In applying agency principles to determine whether a supervisor exercised actual or apparent authority, all relevant factors must be considered, including whether the employer had a policy and procedures, and whether prompt remedial action was taken by the employer. Where, as here, an employer has an express policy against sexual harassment and procedures to promptly remedy complaints, the employer effectively divests the supervisor of any apparent authority.

This case, like *Vinson*, is a submission case. In a "submission" case, *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205 (D.R.I. 1991), the court did not use an absolute liability standard, but rather looked at all relevant factors. That court stated that the "availability and practical viability of an employer's grievance procedure" is "an important factor". *Id.* at 1211. In *Showalter*, as in *Vinson*, the employee handbook required the employee to consult his or her supervisor, who in each case was the alleged harasser. Moreover, the employer failed "to have a policy or readily accessible personnel available to handle sexual harassment complaints." *Id.* at 1212. Accordingly, the *Showalter* court, upon review of all relevant factors, enjoined future sexual harassment and directed the employer to designate an officer to receive and process sexual harassment complaints.[7] In short, effective policy and procedures are "plainly relevant".

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[7] By contrast, Columbia University's procedures designate over thirty officers to whom complainants can go regarding sexual harassment.

Thus, the Court of Appeals in this case ignored agency principles and adopted a legal standard of absolute liability, thereby placing the Second Circuit in conflict with this Court and other Circuits.

III

THIS CASE RAISES IMPORTANT QUESTIONS OF FEDERAL LAW CONCERNING SEXUAL HARASSMENT IN THE WORKPLACE THAT SHOULD BE RESOLVED BY THIS COURT

A primary purpose of Title VII insofar as it relates to sexual harassment in the workplace is prevention and prompt action to remedy complaints by those who claim that they are victims. *See* EEOC Policy, 8 Fair Empl. Prac. Manual (BNA) 405:6699. To that end, where an employer has a specific policy and procedures concerning sexual harassment, several purposes are served. The policy makes clear that the employer will not tolerate sexual harassment. Moreover, the procedures empower the employee to protect himself or herself in the event a supervisor or co-worker ignores the stated policy. By utilizing the procedures that, as here, result in prompt remedial action, the employee need not be a victim. Rather, utilization of the procedures can serve the preventative purpose of Title VII. Such policy and procedures effectuate the obligations of and protections to both employees and employers under Title VII. By allowing courts to consider, in determining employer liability, the existence of such procedures, and whether the employee utilized them, employers have an incentive to institute effective procedures and employees are encouraged to use them. By ignoring an employer's policy and procedures, and creating a standard of absolute liability, these incentives evaporate.

Moreover, often there is a fine line between purely private relationships between individuals in the workplace and sexual

harassment. Absolute liability standards may leave employers no choice but to attempt to prohibit any relationships in the workplace.[8]

This was not the intent of Title VII, and it could be argued that it would be inappropriate for an employer to meddle in a purely private relationship between two employees even if one is a supervisor.[9] As the EEOC noted in its brief to this Court in *Vinson*, "sexual attraction is a fact of life in the workplace." (Brief of the United States Department of Justice and Equal Employment Opportunity Commission as Amici Curiae, *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979) at 13.) The EEOC has previously cautioned courts to refrain from unfairly subjecting employers to liability for an ill-defined class of activities and from intruding improperly and unnecessarily upon the privacy of individuals involved in social relationships. *Id.* at 16. In *Vinson*, the EEOC

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[8] As previously noted by Judge Bork in a dissenting opinion joined by Justice Scalia (while a member of the United States Court of Appeals, District of Columbia), employers should not perform a police function concerning employees' private relationships. *Vinson v. Taylor*, 760 F.2d 1330, 1331 n. 3 (D.C. Cir. 1985). Justice Scalia argued that cases such as this one raise difficult and important questions of employer liability under Title VII that should be judicially considered.

[9] The Labor Law of New York (where this case originates) Section 201-d (App. A35) contains prohibitions which can prevent employers from interfering with relationships among employees. This new statute has resulted in two lawsuits where an employer attempted to enforce an anti-fraternization policy. *Allen v. Wal-Mart Stores, Inc.*, 93-CV-0685, FJS-DNH (N.D.N.Y. filed May 26, 1993), and *State of New York v. Wal-Mart Stores, Inc.*, 80737/93 (Sup. Ct. Fulton Co., N.Y. April 5, 1994). New York's Attorney General has taken the position that relationships between supervisors and subordinates are protected from employer interference under this statute. Randall Samborn, *Love Becomes A Labor Law Issue*, Nat'l L.J., Feb. 14, 1994, at 1, 33.

argued that a rule of strict liability would create an incentive for employers to monitor or police employee relationships. *Id.* at 26.[10]

Rather than imposing an absolute liability standard on employers for supervisor conduct, a case by case analysis of whether an employer should be liable for alleged supervisor harassment promotes the purposes of Title VII. Such analysis, of course, includes many factors, among which are the employer's policy and procedures and whether the complainant took advantage of their availability. This analysis, which is based on agency principles, is applicable to both hostile environment claims and *quid pro quo* claims in "submission" cases, and effectuates this Court's reasoning in *Vinson* and the goals of Title VII.

Where an employer does *not* have a policy against sexual harassment or procedures available to prevent and/or promptly remedy it, an employee confronted with implicit threats by a supervisor may feel compelled to submit to supervisor sexual advances. In such a situation, the supervisor may be said to have apparent authority to carry out those implicit threats and a basis for employer liability may exist.

In contrast, where as in this case, the employer has a policy against sexual harassment and there are effective procedures available, the employer may divest a supervisor of apparent authority to carry out the implicit threats. In such a situation, there is no reason for an employee to submit to alleged unwelcomed sexual advances of a supervisor. Rather, the employee has the

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[10] It should be noted that the EEOC submitted a Brief as Amicus Curiae to the Court of Appeals in this case, in which the EEOC assumed that Urban had used his delegated authority to harass Karibian and thus argued that employer liability should be absolute. The National Women's Law Center and the ACLU submitted a brief Amici Curiae in the Court of Appeals taking the same view as the EEOC.

power to protect himself or herself by using the available procedures.

Thus, employer liability in a "submission" case (which does not involve any economic loss) should not be absolute. This is particularly so where, as here, the employee chose when to use available procedures and which procedures to utilize at any particular time during the alleged relationship.

Absent a rule of strict liability in such "submission" cases, district courts can review all relevant factors, whether the situations involve co-employees or supervisors and subordinates, and there will be responsibilities and benefits to employees and employers. By encouraging employees not to "submit" but rather to utilize available procedures, employees will be better protected. Similarly, employers will be encouraged to take the necessary steps to prevent sexual harassment.

CONCLUSION

There are special and important reasons for this Court to grant a Writ of Certiorari. This case raises important questions of federal law regarding the role of employers' sexual harassment policies and procedures, the respective duties of employers and employees concerning supervisor-subordinate relationships, and whether an absolute standard of strict liability undermines the purposes of Title VII and detracts from the protections currently contemplated in the workplace.

By ignoring the directives of this Court in *Vinson* and adopting a standard for employers of absolute liability as a matter of law for supervisor conduct in submission cases, whether hostile environment or *quid pro quo*, the Court of Appeals placed the Second Circuit in conflict with this Court and other Circuits. The conflict with this Court and the unsettled state of the law among the Circuits, the importance of the issues presented by this case, the

impact of those issues on employment relations, and the significance of employment discrimination claims to the business of the federal courts, all warrant consideration of the case by this Court.

For the foregoing reasons, this Court should grant the petition and issue a Writ of Certiorari to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: New York, New York
April 22, 1994

APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 513—August Term, 1993

(Argued: November 17, 1993 Decided: January 25, 1994)

Docket No. 93-7188

SHARON KARIBIAN,

Plaintiff-Appellant,

-v-

COLUMBIA UNIVERSITY, JOHN BORDEN,

Defendants-Cross-Claimants-Appellees,

-v-

MARK URBAN,

Defendant-Cross-Defendant-Appellee.

Before:

MAHONEY, MCLAUGHLIN AND HEANEY*,

Circuit Judges.

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* Honorable Gerald W. Heaney, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Sharon Karibian appeals from a judgment entered in the United States District court for the Southern District of New York (Griesa, *C.J.*) granting summary judgment to Columbia University and dismissing Karibian's sexual harassment complaint. The district court held that Columbia could not be liable either (1) under a *quid pro quo* theory unless Karibian could prove actual economic loss, or (2) under a hostile work environment theory unless Columbia had notice of the harassment or provided no reasonable avenue for complaint.

REVERSED and REMANDED.

ELIZABETH L. KOOB, New York, NY (Joan Magoolaghan, Cara Cherry, Law Student, Koob & Magoolaghan, New York, NY, of counsel), *for Plaintiff-Appellant.*

DIANE S. WILNER, New York, NY (Lee S. Gayer, Joel B. Rothman, Wilner & Associates, P.C., of counsel), *for Defendants-Appellees Columbia University and John Borden.*

KAREN M. MORAN, Washington, D.C. (James R. Neely, Jr., Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, United States Equal Employment Opportunity Commission Office of General Counsel, of counsel), *for the Equal Employment Opportunity Commission as amicus curiae.*

Clifford M. Solomon, Corwin Solomon & Tanenbaum, P.C., New York, NY, *for Defendant-Cross-Defendant-Appellee Mark Urban.*

Isabelle Katz Pinzler, Sara L. Mandelbaum, Women's Rights Project, American Civil Liberties Union, Ellen J. Vargyas, Deborah L. Brake, National Women's Law Center, submitted an amici curiae brief for the Women's Rights Project of the ACLU and the National Women's Law Center on behalf of Plaintiff-Appellant.

McLAUGHLIN, *Circuit Judge:*

Sharon Karibian appeals from a judgment entered in the United States District Court for the Southern District of New York (Thomas P. Griesa, *Chief Judge*) granting summary judgment to defendants Columbia University and John Borden, and dismissing Karibian's complaint of employment discrimination. Karibian's complaint alleged that sexual harassment committed by her supervisor, defendant Mark Urban, constituted discrimination by Columbia on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), and section 296 of New York's Executive Law. Karibian additionally alleged various state law tort claims against Columbia, Borden and Urban.

In the district court, Karibian proceeded under both available theories of sexual harassment: *quid pro quo*, and hostile work environment. In granting summary judgment to defendants, the district court held that Columbia could not be liable under a *quid pro quo* theory because Karibian failed to prove any actual economic loss resulting from Urban's harassment. On her hostile work environment theory, the court held that Columbia was not liable to Karibian because it did not have notice of Urban's harassment and had provided a reasonable avenue for harassment complaints. *Karibian v. Columbia Univ.*, 812 F. Supp. 413 (S.D.N.Y. 1993).

We conclude that the district court erred in requiring Karibian to demonstrate actual economic loss to prove *quid pro quo* sexual

harassment. We also conclude that the court failed to apply the proper legal standard to determine an employer's liability for the hostile work environment created by a supervisor. Accordingly, we reverse and remand for further proceedings.

BACKGROUND

In 1987, while a student in Columbia University's General Studies Program, Sharon Karibian worked in Columbia's fund raising "Telefund" office. Telefund was administered for Columbia by an independent contractor, Philanthropy Management Company ("PMI"), and was staffed by both PMI and Columbia employees. Karibian was an employee of Columbia. The Telefund office operated under the aegis of Columbia's "University Development and Alumni Relations" office ("UDAR").

In September 1987, Columbia appointed defendant Mark Urban as Development Officer for Annual Giving at UDAR. In that capacity, Urban had supervisory authority over Telefund, and, consequently, over Karibian. Specifically, Urban had the authority to alter Karibian's work schedule and assignments, and to give her promotions and raises (subject to approval). In addition, Urban had at least the apparent authority to fire Karibian.

This case involves Urban's alleged conduct towards Karibian while the two were employees of Columbia. Urban conceded that he and Karibian had a sexual relationship while he was her supervisor; however, the nature of that relationship — *i.e.*, whether consensual or coercive — remains hotly disputed. We limit our discussion to Karibian's version of events.

While working at UDAR, Urban "pursued" Karibian by repeatedly inviting her out to bars, ostensibly to discuss work-related matters. On those occasions, Urban often asked Karibian back to his apartment. Initially, Karibian rebuffed Urban's advances; ultimately, however, she yielded to pressure from Urban.

Specifically, Karibian claimed that Urban coerced her into a violent sexual relationship by telling her that she "owed him" for all he was doing for her as her supervisor. Karibian also claimed that the conditions of her employment — including her raises, hours, autonomy and flexibility — varied from time to time, depending on her responsiveness to Urban. Karibian stated that she believed she would be fired if she did not give in to Urban's demands.

At first, Karibian told no one about her relationship with Urban. After some time, however, Karibian contacted two counselors at Columbia. In September 1988, Karibian contacted Columbia's Panel on Sexual Harassment, and met with Panel member Mary Murphy. Karibian told Murphy that she was afraid her boss would retaliate against her if she stopped sleeping with him. Shortly thereafter, Karibian met with Columbia's Equal Opportunity Coordinator, Ruth Curtis. At Karibian's request, both meetings were held confidential, and neither resulted in any investigation of Urban. According to Karibian, both Murphy and Curtis discouraged her from actively pursuing a complaint against Urban.

In April 1989, Karibian came to work upset and told her immediate Telefund supervisor, Loren Spivack, of a particularly violent sexual encounter with Urban. Spivack, a PMI employee, notified PMI's president, Ron Erdos. Neither Spivack nor Erdos informed anyone at Columbia about the incident.

Around July of 1989, Karibian applied for the position of Annual Giving Development Officer at Columbia. Columbia did not immediately consider Karibian for the position because Urban delayed forwarding her resume to the personnel department. Although Columbia eventually considered Karibian's application, she did not get the job. About the same time, Karibian applied for and received a promotion to the position of Project Director, the highest position within Telefund. As Project Director, Karibian reported directly to Urban at UDAR.

In January 1990, Karibian complained to Gertrude de la Osa, the Director of Development Services at UDAR, that she was afraid of being fired by Urban and that Urban was "sabotaging" her at Telefund. De la Osa brought Karibian's complaint to the attention of UDAR's Deputy Vice President, defendant John Borden. Around the same time, Karibian met again with Ruth Curtis; this time, Karibian dropped her request for confidentiality and gave Curtis permission to speak to others at Columbia about her troubles with Urban.

At this point, Columbia took steps to resolve the problem. Borden asked Urban to write a chronology of his relationship with Karibian, and removed him from direct supervisory authority over Karibian. (According to Urban's chronology, his relationship with Karibian was entirely consensual.) Without crediting either Karibian's or Urban's characterization of their relationship, Columbia forced Urban to resign — for reasons that remain somewhat vague. In August 1990, Columbia closed the Telefund office and Karibian was laid off.

Karibian then brought this suit against Columbia, Borden and Urban, claiming that Urban's sexual harassment violated Title VII. Following discovery, the district court granted defendants' motion for summary judgment.

The court began its analysis by recognizing that Title VII encompasses two theories of sexual harassment: *quid pro quo*, and hostile work environment. 812 F. Supp. at 416. Rejecting Karibian's *quid pro quo* claim, the court ruled that this theory requires proof of "actual — rather than threatened — economic loss because of gender or because a sexual advance was made and rejected." *Id.* Because Karibian had not suffered any economic detriment during her relationship with Urban — in fact, she had been promoted and had received pay raises during the relevant time — the court ruled that Karibian had no valid claim for *quid pro quo* harassment. *Id.*

The district court also rejected Karibian's hostile work environment theory. Relying on *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992), the court held that Karibian "must prove 'that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it.'" 812 F. Supp. at 416 (*quoting Kotcher*, 957 F.2d at 63). Applying this standard, the court ruled that (1) Columbia provided a reasonable avenue for making complaints, and (2) once Columbia got actual notice of Urban's misconduct in 1990, it promptly took adequate curative measures. On the latter point, the court rejected Karibian's argument that her confidential disclosures to Murphy and Curtis were sufficient to put Columbia on notice of Urban's harassment. The court also rejected Karibian's alternative argument that notice to her supervisors at PMI, an independent contractor, constituted notice to Columbia. Having disposed of Karibian's federal claim, the court went on to dismiss Karibian's pendent state law claims for lack of jurisdiction.

Karibian now appeals.[1]

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[1] In the district court, Karibian also alleged that Columbia closed the Telefund office in retaliation for Karibian's sexual harassment complaint. *See* 812 F. Supp. at 417. In her main brief on appeal, Karibian does not argue the point separately. Rather, Karibian simply characterizes the "premature" closing of the Telefund office as "retaliatory" in the context of her argument that Columbia's complaint procedures were inadequate.

We have no obligation to review issues that are raised, but not independently and sufficiently developed, in an appellant's main brief. *See Freeman United Coal Mining Co. v. OWCP*, 957 F.2d 302, 305 (7th Cir. 1992). We conclude that for purposes of appeal, Karibian has forfeited — if not abandoned — any independent claim she may have had for retaliatory discharge by subsuming that argument within her hostile work environment argument. *See, e.g., Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 362 (1st Cir. 1989).

DISCUSSION

By its terms, Title VII prohibits discrimination on the basis of sex with respect to the "compensation, terms, conditions, or privileges" of employment. 42 U.S.C. § 2000e-2(a)(1)(1988). Although neither the statute nor its legislative history fleshes out the meaning of this sweeping prohibition, it is now established law that sexual harassment in the work place violates "Title VII's broad rule of work place equality." *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993). While the law of sexual harassment continues to develop at a brisk pace, a plaintiff seeking relief for sexual harassment may presently proceed under two theories: (1) *quid pro quo*, and (2) hostile work environment. *See Meritor Sav. Bank, FSB v. Vinson*, 477, U.S. 57, 64-65 (1986); *Kotcher*, 957 F.2d at 62. Karibian believes that Urban's harassment fits both paradigms; and we address each in turn.

I. *Karibian's Quid Pro Quo Claim*

Under the Guidelines established by the Equal Employment Opportunity Commission ("EEOC"), *quid pro quo* harassment occurs when "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decision affecting such individuals." 29 C.F.R. § 1604.11(a)(2)(1993). *See also Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 577 (2d Cir. 1989). Accordingly, to establish a *prima facie* case of *quid pro quo* harassment, a plaintiff must present evidence that she was subject to unwelcome sexual conduct, and that her reaction to that conduct was then used as the basis for decisions affecting the compensation, terms, conditions or privileges of her employment. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988); *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 648 (6th Cir. 1986); *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982).

Because the *quid pro quo* harasser, by definition, wields the employer's authority to alter the terms and conditions of employment — either actually or apparently — the law imposes strict liability on the employer for *quid pro quo* harassment. *See Kotcher*, 957 F.2d at 62 ("The supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee."); *Carrero*, 890 F.2d at 579 ("[T]he harassing employee acts as and for the company, holding out the employer's benefits as an inducement to the employee for sexual favors.").

Karibian argues that the district court erred when it required her to present evidence of actual, rather than threatened, economic loss in order to state a valid claim of *quid pro quo* sexual harassment. We agree. There is nothing in the language of Title VII or the EEOC Guidelines to support such a requirement. *See Meritor*, 477 U.S. at 64 ("[T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination.").

True, in the typical *quid pro quo* case, the employee who refuses to submit to her supervisor's advances can expect to suffer some job-related reprisal. *See, e.g., Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 142 (2d Cir. 1993). Accordingly, in such "refusal" cases, evidence of some job-related penalty will often be available to prove *quid pro quo* harassment. But that is not to say that such evidence is always essential to the claim. In the nature of things, evidence of economic *harm* will not be available to support the claim of the employee who *submits* to the supervisor's demands. *Lipsett*, 864 F.2d at 913; *see, e.g., Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205, 1212 (D.R.I. 1991). The supervisor's conduct is equally unlawful under Title VII whether the employee submits or not. Under the district court's rationale, only the employee who successfully resisted the threat of sexual blackmail could state a *quid pro quo* claim. We do not read Title VII to punish the victims of sexual harassment who surrender to unwelcome

sexual encounters. Such a rule would only encourage harassers to increase their persistence.

The relevant inquiry in a *quid pro quo* case is whether the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances. It is enough to show that the supervisor used the employee's acceptance or rejection of his advances as the basis for a decision affecting the compensation, terms, conditions or privileges of the employee's job. *See, e.g., Showalter*, 767 F. Supp. at 1212 ("The obvious tangible job benefit the plaintiffs received for succumbing to the harassment was the retention of their employment."). In this case, Karibian stated that her work assignments, raises and promotions depended on her continued responsiveness to Urban's sexual demands. In addition, Karibian claimed that Urban implicitly threatened to fire her and to damage her career if she did not comply. If true, Urban's conduct would constitute *quid pro quo* harassment because he made and threatened to make decisions affecting the terms and conditions of Karibian's employment based upon her submission to his sexual advances.

In support of an "actual economic loss" requirement, Columbia relies on isolated language from the *Kotcher* and *Carrero* cases, *supra*, decided by this Court. In *Kotcher*, we broadly stated that under a *quid pro quo* theory "the plaintiff-employee must establish that she was *denied an economic benefit* either because of gender or because a sexual advance was made by a supervisor and rejected by her." 957 F.2d at 62 (emphasis added). *Kotcher*, however, was a hostile work environment case, not a *quid pro quo* case; hence, the quoted language is, at best, dictum.

Carrero was a *quid pro quo* case, and there we did say: "The gravamen of a quid pro quo claim is that a tangible job benefit or privilege is conditioned on an employee's submission to sexual blackmail and that *adverse consequences* follow from the employee's refusal." 890 F.2d at 579 (emphasis added). *Carrero*, however, was a "refusal" case, not a "submission" case;

accordingly, as one might expect, the job-related consequences of Carrero's refusal were both obvious and "adverse." Consistent with the *prima facie* case outlined above, Carrero satisfied Title VII because her supervisor made decisions affecting her employment based on her response to his sexual advances. We read *Carrero's* reference to "adverse consequences," therefore, as descriptive of the facts before the Court, not as establishing a *sine qua non* that employment decisions be "adverse" in order to state a valid claim. Accordingly, there is no inconsistency between *Carrero* and our conclusion that once an employer conditions any terms of employment upon the employee's submitting to unwelcome sexual advances, a *quid pro quo* claim is made out, regardless of whether the employee (a) rejects the advances and suffers the consequences, or (b) submits to the advances in order to avoid those consequences.

Finally, we believe imposing an "actual economic loss" requirement in a *quid pro quo* case where the employee submits to the unwelcome sexual overtures of her supervisor places undue emphasis on the victim's response to the sexual harassment. The focus should be on the prohibited conduct, not the victim's reaction. While the employee's submission to the supervisor's advances is certainly relevant, it bears only on the issue whether the sexual advances were unwelcome, not whether unwelcome sexual advances were unlawful. *See Meritor*, 477 U.S. at 68 ("The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome...."). Ultimately, the question whether Karibian submitted to Urban's advances out of a reasonable fear of some job-related reprisal is properly one for the finder of fact. Because the district court erroneously removed this central question from the factfinder by the grant of summary judgment, we reverse.

II. *Columbia's Liability for Hostile Work Environment*

Karibian also contends that the district court erred when it held that Columbia could be liable under a hostile work environment theory only if she satisfied the standard applied in *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992). In *Kotcher*, we said that the plaintiff must prove that the employer "either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." 957 F.2d at 63. Karibian contends that this standard is not applicable to all claims of hostile work environment, and that a different standard obtains here. Columbia responds that the standard described in *Kotcher* governs an employer's liability in this and *every* hostile work environment case. Again, Karibian has the better argument.

A hostile work environment exists "[w]hen the work place is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment,'" *Harris*, 114 S.Ct. at 370 (quoting *Meritor*, 477 U.S. at 65, 67). Whereas liability for *quid pro quo* harassment is always imputed to the employer, a plaintiff seeking to establish harassment under a hostile environment theory must demonstrate some specific basis to hold the employer liable for the misconduct of its employees. *Kotcher*, 957 F.2d at 62. Unfortunately, the "specific basis" of employer liability for a hostile work environment remains elusive.

In *Meritor*, the Supreme Court declined to announce a definitive rule on employer liability in hostile work environment cases. *Meritor*, 477 U.S. at 72. *Meritor* did, however, make two things clear: employers are not always liable for the hostile work environment created by their employees. *Id.* And, lack of notice and the existence of complaint procedures do not automatically insulate an employer from liability. *Id.* Beyond these alpha and omega rules, the Court declined to offer further enlightenment. Instead, we are instructed to be guided by common-law principles of agency. *Id.*

A rule of employer liability deriving from traditional agency principles cannot be reduced to a universal, pat formula. It will certainly be relevant to the analysis, for example, that the alleged harasser is the plaintiff's supervisor rather than her co-worker. *See, e.g., Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 183 (6th Cir.) (contrasting standard of employer liability in cases of co-worker harassment from that applicable in cases of supervisor harassment), *cert. denied*, 113 S. Ct. 831 (1992); *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 604 (7th Cir. 1985) (suggesting that a notice requirement may be necessary in cases of co-worker harassment, but not in cases of harassment by supervisors). Yet, even such a distinction will not always be dispositive. For example, we held in *Kotcher*, that the employer was not liable for the hostile work environment caused by the plaintiff's supervisor absent notice or the failure to provide a reasonable avenue for complaint. 957 F.2d at 63. We went on to caution, however, that we were not dealing in absolutes and that the *Kotcher* rule would not necessarily apply in all cases; we noted, for example, that "[a]t some point... the actions of a supervisor at a sufficiently high level in the hierarchy would necessarily be imputed to the company." *Id.* at 64.

We have not yet had occasion to address the proper standard of employer liability where, as here, the plaintiff's supervisor created a discriminatorily abusive work environment through the use of his delegated authority. Common law principles of agency suggest that in such circumstances the employer's liability is absolute.

The Restatement of Agency notes that an employer will be liable for the torts of its employees committed "while acting in the scope of their employment," or, if not acting in the scope of employment, if the employee "purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." *Restatement (Second) of Agency* § § 219 (1) & (2)(d)

(1958). Hence, when a supervisor makes employment decisions based on an employee's response to his sexual overtures, it is fair to hold the employer responsible because "the supervisor is acting within at least the apparent scope of the authority entrusted to him by the employer." *Henson*, 682 F.2d at 910.

We hold that an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship. *See Restatement (Second) of Agency* § 219 29 C.F.R. § 1604.11(c); *see also Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 579 (10th Cir. 1990); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559-60 (11th Cir. 1987); *Watts v. New York City Police Dep't*, 724 F.Supp. 99, 106 n. 6 (S.D.N.Y. 1989). In contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's co-workers; consequently, the *Kotcher* standard of employer liability will generally apply, and the employer will not be liable unless "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." *Kotcher*, 957 F.2d at 63. *See* 29 C.F.R. § 1604.11(d); *see also Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1189 (2d Cir. 1987); *Snell v. Suffolk County*, 782 F.2d 1094, 1104 (2d Cir. 1986). *Cf. Hirschfeld*, 916 F.2d at 579 (employer not liable absent evidence that supervisor "ever invoked [his] authority in order to facilitate his harassment of plaintiff").

Applying these principles, we agree with Karibian that Columbia would be liable for Urban's alleged harassment regardless of the absence of notice or the reasonableness of Columbia's complaint procedures. The essence of Karibian's hostile work environment claim is that her supervisor capitalized upon his authority over her employment to force her to endure a prolonged, violent and

demeaning sexual relationship. If the factfinder accepts Karibian's allegations, Columbia is liable to Karibian because Urban abused his delegated authority to create a discriminatorily abusive work environment.

Our conclusion that Columbia would be liable on a hostile environment claim for the harassment alleged by Karibian follows naturally from our earlier conclusion that Karibian stated a valid claim for *quid pro quo* harassment. Under the latter, courts have universally held employers liable for the actions of the supervisor because "[t]he supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee. From the perspective of the employee, the supervisor and the employer merge into a single entity." *Kotcher*, 957 F.2d at 62. *See also Carrero*, 890 F.2d at 579 ("in *quid pro quo* cases the harassing employee acts as and for the company, holding out the employer's benefits as an inducement to the employee for sexual favors"); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) ("When a supervisor requires sexual favors as *quid pro quo* for job benefits, the supervisor, by definition, acts as the company."); *Henson*, 682 F.2d at 910 (in a *quid pro quo* case, "the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose"). It would be a jarring anomaly to hold that conduct which always renders an employer liable under a *quid pro quo* theory does not result in liability to the employer when that same conduct becomes so severe and pervasive as to create a discriminatorily abusive work environment.

Columbia argues that holding it liable for Urban's harassment is contrary to the standard of employer liability we applied in *Kotcher*. We disagree. In *Kotcher*, the gist of the plaintiff's hostile work environment claim was that her supervisor subjected her to repeated vulgar comments and gestures. 957 F.2d at 61. We held that the employer would not be liable for the supervisor's misconduct unless the employer provided no reasonable avenue for complaint, or

unless it knew of the supervisor's misconduct but did nothing about it. 957 F.2d at 63. As support for this standard of liability, we relied on *Snell v. Suffolk County*, 782 F.2d 1094, 1104 (2d Cir. 1986), in which the harassment was perpetrated by the plaintiff's co-workers. In both *Kotcher* and *Snell* we simply applied the law of agency to the facts before us and concluded that liability for the misconduct alleged could not be imputed to the employer. In neither *Kotcher* nor *Snell*, however, did the harasser use his actual or apparent authority to further the harassment alleged. Thus understood, our holding today is complementary to *Kotcher*, not inconsistent with it.

CONCLUSION

The judgment of the district court granting summary judgment on Karibian's Title VII claim is reversed and the matter is remanded for further proceedings consistent with this opinion. Because we reinstate Karibian's federal claim, the judgment dismissing Karibian's pendent state law claims for lack of jurisdiction is reversed as well. Finally, Columbia's request for an order directing Karibian to share the cost of supplemental appendix is denied.

REVERSED and REMANDED.

APPENDIX B

United States District Court

SOUTHERN DISTRICT OF NEW YORK

SHARON KARIBIAN,

Plaintiff,

- against -

COLUMBIA UNIVERSITY, JOHN BORDEN and MARK URBAN,

Defendants.

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91 Civ. 3135 (TPG)

OPINION

This is a sexual harassment case. There is a claim against Columbia University under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. There are also various claims against Columbia under state law theories. Defendants Borden and Urban are sued solely under state law theories.

Defendants Columbia and Borden move for summary judgment. The motion is granted. For reasons hereafter set forth, the Title VII claim against Columbia must be dismissed because there is no triable issue of fact. As to the state law claims against Columbia and the claims against Borden, there is no jurisdiction after dismissal of the Title VII portion of the action.

Although Urban has not made a motion, the court dismisses the action against him on its own motion, for lack of jurisdiction.

FACTS

In late 1986 while plaintiff was a student at Columbia, she obtained part-time employment with the University. The office she worked at was called "Telefund at Columbia University." Although it was part of the University, its activities were to some extent designed and administered by a separate company called Philanthropy Management, Inc. ("PMI"). The people working at Telefund consisted of both Columbia University employees and PMI employees. Telefund operated under the aegis of an entity at Columbia called University Development and Alumni Relations ("UDAR").

Defendant Urban was employed by Columbia University commencing in September 1987. He worked in UDAR and his duties included responsibility for Telefund. Borden was Deputy Vice President of UDAR from April 1, 1988 until sometime in 1991. He was Urban's superior.

Plaintiff alleges that she met Urban in the spring of 1987, before Urban went to work for Columbia. She alleges that Urban pressured her into having sexual relations commencing shortly after they met and continuing through 1989.

Columbia has an established mechanism for dealing with sexual harassment. Columbia publishes a bulletin entitled "Protection Against Sexual Harassment." The bulletin starts with a Policy Statement, which includes the unequivocal declaration the "the University prohibits sexual harassment of any member of the Columbia community." The bulletin describes remedies provided by the University. A person who believes that he or she is being sexually harassed is invited to confer with a member of the University Panel on Sexual Harassment. There is also provision for the aggrieved party (or the panel member with permission of the aggrieved party) to discuss the problem with the University's Office of Equal Opportunity and Affirmative Action ("EOAA"). Finally,

the party alleging sexual harassment may file a grievance under the applicable University grievance procedure.

It is agreed by both sides that the first two steps - *i.e.*, resort to the University Panel on Sexual Harassment or resort to the EOAA - are entirely confidential. This means that there is no effort to investigate the matter or to obtain a remedy against the alleged guilty party. The grievance procedure, on the other hand, is not confidential and sets in motion an investigation and other steps which may lead to remedial action against the party complained of.

During September 1988 plaintiff consulted with one of the members of the Sexual Harassment Panel and also with an employee at the EOAA. Plaintiff concedes that she knew that these consultations were confidential. The EOAA employee has stated, without contradiction, that plaintiff specifically requested that there be no investigation at that time. The sexual relations between plaintiff and Urban continued.

Plaintiff claims that in April 1989, after Urban allegedly forced her to perform a sexual act, she related this incident to Loren Spivack, an employee of PMI. Plaintiff asserts that Spivack informed her that he had relayed the information to the president of PMI, Ron Erdos. Plaintiff goes on to assert her belief that Erdos in turn reported the incident to defendant Borden.

Plaintiff's statement under Local Civil Rule 3(g) alleges that defendant Borden knew or should have known that plaintiff was subjected to sexual harassment since at least April 1989. Borden's 3(g) statement asserts that he did not learn about plaintiff's complaint until 1990.

It should be noted that the presentations of all parties on the motion for summary judgment are based mainly on the extensive depositions taken in the case.

No deposition of Spivack or Erdos was taken. At least, there is no reference to such deposition testimony in the present motion. Borden's deposition was taken. Plaintiff's attorney asked Borden if he knew about a "nonbusiness relationship" between plaintiff and Urban, to which Borden replied that, when Urban recommended plaintiff for a promotion in late August 1989, Urban said that he and plaintiff had dated but that they were no longer dating. Borden testified that he learned nothing further until January 1990.

Thus there is no support in Borden's deposition or in any other evidence for the idea that Borden learned of the problem in April 1989. Plaintiff's proposition to this effect is entirely speculative.

After April 1989 sexual relations between plaintiff and Urban continued. On January 30, 1990 plaintiff met with Gertrude de la Osa, Director of Development Services at UDAR and complained about sexual harassment by Urban. The matter was promptly reported by de la Osa to Borden. An investigation was immediately conducted by Borden with the assistance of the Office of General Counsel of the University.

By early March Urban was relieved of any supervisory role with respect to plaintiff. In April 1990 Urban's resignation was requested and given. He left the University at that time.

DISCUSSION

A sexual harassment claim under Title VII may be based on either of two theories: (1) "quid pro quo" or (2) hostile work environment. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64-65 (1986).

In order to prevail on a quid quo pro theory, the plaintiff must show an actual — rather than threatened — economic loss because of gender or because a sexual advance was made and rejected. Plaintiff produces no evidence demonstrating that she was denied an economic benefit. In fact, during the period of the alleged

harassment, plaintiff was promoted from clerical worker to Project Director of Telefund. Her salary also increased. The court finds that there is no indication of any valid claim under the quid pro quo theory.

The allegations under the hostile environment theory must be dealt with in more detail. In the motion for summary judgment, Columbia does not attempt to disprove the allegations of misconduct against Urban. Columbia's position is that, even if Urban committed the misdeeds alleged, Columbia is not liable.

The Supreme Court has not established a definitive rule for employer liability, but has directed lower courts to draw from traditional agency principles. *Vinson*, 477 U.S. at 72. The Second Circuit has interpreted this guideline to mean that a plaintiff must prove "that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 63 (2d Cir. 1992).

There is no basis for any contention that Columbia University failed to provide a reasonable avenue for making complaints. The only possible ground for holding Columbia liable is that it knew of the misconduct of Urban and failed to take remedial steps.

In this connection, plaintiff contends that Columbia knew of the sexual harassment in September 1988, at the time of her consultations with the Sexual Harassment Panel and with the EOAA. Plaintiff contends that, despite this knowledge, Columbia did nothing about the problem. Plaintiff further contends that Columbia knew about the difficulty in April 1989 when she described it to Spivack of PMI. Plaintiff contends that again Columbia failed to perform its duty to take remedial action.

The information which certain Columbia employees learned in September 1988 was obtained in the course of consultations which were intended to be completely confidential. It cannot be said that

this was "knowledge" on the part of Columbia of the kind that gave Columbia the duty to inquire and take remedial action. Plaintiff chose these confidential procedures instead of availing herself of the right, offered by the University, to file a grievance and initiate an investigation leading to a possible remedy against Urban. Columbia could hardly be expected to act against Urban as a result of the confidential consultations of September 1988.

In connection with plaintiff's claim that Columbia should have taken action in April 1989, the essential fact is that plaintiff spoke to an employee of a separate company, PMI, and did not speak to anyone at Columbia. Despite an extensive deposition record, there is absolutely no evidence that any PMI employee notified Borden or anyone else at Columbia of what plaintiff said.

Plaintiff contends that notice to PMI was the equivalent of notice to Columbia, and that PMI's knowledge should be taken to be the knowledge of Columbia. The court rejects this theory. PMI was a small company performing a service as an independent contractor to Columbia. It was not responsible for policing the problems arising between one Columbia University employee and another. If PMI had reported the matter, it would have involved going over Urban's head to someone such as Borden, and relaying a complaint about Urban. Perhaps this would have been a worthy thing to do, but PMI had no legal duty to do so, and indeed had economic reasons for minding its own business.

But overriding all of this is the salient fact that plaintiff had the ability in April 1989 or at any time to go directly to Columbia with her complaint. She did not have to rely on the uncertain, indirect channel of PMI. Under all the circumstances, the court rules that notice to PMI was not notice to Columbia and that PMI's knowledge was not the knowledge of Columbia. The events of April 1989 did not impose on Columbia any duty to take remedial action against Urban.

The first time that plaintiff made a complaint of such a nature as to require action on the part of Columbia was in late January 1990. When this occurred Columbia took prompt and effective remedial action. Within a reasonable time plaintiff was removed from Urban's supervision. Shortly thereafter Urban's employment was terminated.

The court rules that Columbia had no duty to investigate, or to take remedial action, until plaintiff made her complaint in late January 1990. Columbia's response to that complaint was prompt and effective. Columbia has demonstrated that it is not liable under Title VII and that there is no triable issue of fact on this claim.

Brief note must be made of a retaliation claim of plaintiff. It appears that plaintiff was terminated in August 1990 along with all other employees working on the Telefund operation. Plaintiff makes a conclusory, totally unsupported allegation that this was in retaliation for her sexual harassment complaint. Columbia has produced conclusive evidence that the Telefund program was cancelled for independent business reasons. The evaluation of the Telefund operation had been going on since the summer of 1989 and in the summer of 1990 a UDAR employee named Veronica Chappelle recommended that the Telefund operation be ended.

In late 1990 Columbia accepted the offer of a different company than PMI to make Columbia a demonstration site for computerized telephone fund raising. This project was developed at no cost to Columbia. Plaintiff admits that she reviewed certain published public listings of job openings for this project, but did not apply.

CONCLUSION

Columbia is entitled to summary judgment dismissing the Title VII claim.

The only basis for jurisdiction over the other claims against Columbia is the doctrine of pendent jurisdiction. All the claims

against Borden and Urban are before the court solely on the basis of pendent jurisdiction.

Since the Title VII claim against Columbia is dismissed, there is no basis for asserting jurisdiction over the remaining claims.

The action is dismissed in its entirety.

SO ORDERED.

Dated: New York, New York
February 2, 1993

S/Thomas P. Griesa
U.S.D.J.

APPENDIX C

United States District Court

SOUTHERN DISTRICT OF NEW YORK

SHARON KARIBIAN,

Plaintiff,

-against-

COLUMBIA UNIVERSITY, JOHN BORDEN and MARK URBAN,

Defendants.

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91 CIVIL 3153 (TPG)

JUDGMENT

Defendants having moved for summary judgment, and the said motion having come before the Honorable THOMAS P. GRIESA, U.S.D.J., and the Court thereafter on February 2, 1993, having rendered its opinion (#71006); dismissing the action as against Mark Urban on the Court's own motion for lack of jurisdiction, and granting the motion, and dismissing the action in its entirety, it is,

ORDERED, ADJUDGED AND DECREED: That defendants Columbia University and John Borden's motion for summary judgment be and it is hereby granted, and it is further,

ORDERED, that the action be and it is hereby dismissed for lack of jurisdiction as against Mark Urban on the Court's own motion, and it is further,

ORDERED, that the action be and it is hereby dismissed in its entirety for the reasons stated in the Court's Opinion, dated February 2, 1993.

Dated: New York, New York
February 4, 1993

S/James M. Parkinson
Clerk

United States District Court

SOUTHERN DISTRICT OF NEW YORK

SHARON KARIBIAN,

Plaintiff,

-against-

COLUMBIA UNIVERSITY, JOHN BORDEN and MARK URBAN,

Defendants.

91 CIVIL 3135 (TPG)

AMENDED JUDGMENT

Defendants moved for summary judgment. The court rendered its opinion of February 2, 1993. A judgment based on that opinion was entered on February 4, 1993. Certain clerical errors were made in that judgment, resulting in this amended judgment as follows.

It is noted that plaintiff asserted a claim under Title VII of the Civil Rights Act of 1964 against defendant Columbia University. Plaintiff also asserted claims under state law against Columbia University. The claims against John Borden and Mark Urban were solely under state law.

It is ordered and adjudged that defendant Columbia University's motion for summary judgment dismissing the Title VII claim is granted.

It is order and adjudged that the claims under state law — that is, the remaining claims against defendant Columbia University and

all the claims defendants against Borden and Urban — are dismissed for lack of jurisdiction.

The entire action is dismissed.

Dated: New York, New York
December 22, 1993

S/Thomas P. Griesa
U.S.D.J.

APPENDIX D

EXCERPTS, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. §§ 2000e, et seq.

SUBCHAPTER VI—EQUAL EMPLOYMENT OPPORTUNITIES

§2000e. Definitions

For the purposes of this subchapter —

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501 (c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * * *

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

* * * *

§ 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * *

§ 2000e-5. Enforcement provisions

* * * *

Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing expedition of case; appointment of master

(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has

not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final

disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Relief available

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the emplcyer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

APPENDIX E

New York Labor Law

§ 201-d (McKinney 1994)

§ 201-d. Discrimination against the engagement in certain activities

1. Definitions. As used in this section:

a. "Political activities" shall mean (i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group;

b. "Recreational" activities shall mean any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material;

c. "Work hours" shall mean, for purposes of this section, all time, including paid and unpaid breaks and meal periods, that the employee is suffered, permitted or expected to be engaged in work, and all time the employee is actually engaged in work. This definition shall not be referred to in determining hours worked for which an employee is entitled to compensation under any law including article nineteen of this chapter.

2. Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:

a. an individual's political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property, if such activities are legal, provided, however, that this paragraph shall not apply to persons whose employment is defined in paragraph six of subdivision (a) of this section seventy-nine-h of the civil rights law, and provided further that this paragraph shall not apply to persons who would otherwise be prohibited from engaging in political activity pursuant to chapter 15 of title 5 and subchapter III of chapter 73 of title 5 of the USCA;

b. an individual's legal use of consumable products prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property;

c. an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property; or

d. an individual's membership in a union or any exercise of rights granted under Title 29, USCA, Chapter 7 or under article fourteen of the civil service law.

3. The provisions of subdivision two of this section shall not be deemed to protect activity which:

a. creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest;

b. with respect to employees of a state agency as defined in sections seventy-three and seventy-four of the public officers law respectively, is in knowing violation of subdivision two, three, four, five, seven, eight, or twelve of section seventy-three or of section seventy-four of the public officers law, or of any executive order, policy, directive, or other rule

which has been issued by the attorney general regulating outside employment or activities that could conflict with employees' performance of their official duties;

c. with respect to employees of any employer as defined in section twenty-seven-a of this chapter, is in knowing violation of a provision of a collective bargaining agreement concerning ethics, conflicts of interest, potential conflicts of interest, or the proper discharge of official duties;

d. with respect to employees of any employer as defined in section twenty-seven-a of this chapter who are not subject to section seventy-three or seventy-four of the public officers law, is in knowing violation of article eighteen of the general municipal law or any local law, administrative code provision, charter provision or rule or directive of the mayor or any agency head of a city having a population of one million or more, where such law, code provision, charter provision, rule or directive concerns ethics, conflicts of interest, potential conflicts of interest, or the proper discharge of official duties and otherwise covers such employees; and interest, potential conflicts of interest, or the proper discharge of official duties and otherwise covers such employees; and

e. with respect to employees other than those of any employer as defined in section twenty-seven-a of this chapter, violates a collective bargaining agreement or a certified or licensed professional's contractual obligation to devote his or her entire compensated working hours to a single employer, provided however that the provisions of this paragraph shall apply only to professionals whose compensation is at least fifty thousand dollars for the year nineteen hundred ninety-two and in subsequent years is an equivalent amount adjusted by the same percentage as the annual increase or decrease in the consumer price index.

4. Notwithstanding the provisions of subdivision three of this section, an employer shall not be in violation of this section where the employer takes action based on the belief either that: (i) the employer's actions were required by statute, regulation, ordinance or other governmental mandate, (ii) the employer's actions were permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement, or (iii) the individual's actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.

5. Nothing in this section shall apply to persons who, on an individual basis, have a professional service contract with an employer and the unique nature of the services provided is such that the employer shall be permitted, as part of such professional service contract, to limit the off-duty activities which may be engaged in by such individual.

6. Nothing in this section shall prohibit an organization or employer from offering, imposing or having in effect a health, disability or life insurance policy that makes distinctions between employees for the type of coverage or the price of coverage based upon the employees' recreational activities or use of consumable products, provided that differential premium rates charged employees reflect a differential cost to the employer and that employers provide employees with a statement delineating the differential rates used by the carriers providing insurance for the employer, and provided further that such distinctions in type or price of coverage shall not be utilized to expand, limit or curtail the rights or liabilities of any party with regard to a civil cause of action.

7. a. Where violation of this section is alleged to have occurred, the attorney general may apply in the name of the people of the state of New York for an order enjoining or

restraining the commission or continuance of the alleged unlawful acts. In any such proceeding, the court may impose a civil penalty in the amount of three hundred dollars for the first violation and five hundred dollars for each subsequent violation.

b. In addition to any other penalties or actions otherwise applicable pursuant to this chapter, where a violation of this section is alleged to have occurred, an aggrieved individual may commence an action for equitable relief and damages.

(Added L.1992, c. 776, § 1; amended L.1992, c. 778, §§ 1,2.)

Supreme Court, U.S.
FILED
MAY 20 1994
OFFICE OF THE CLERK

No. 93-1674

IN THE

Supreme Court of The United States

OCTOBER TERM, 1993

THE TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK and JOHN BORDEN,

Petitioners,

-vs.-

SHARON KARIBIAN and MARK URBAN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

ELIZABETH L. KOOB
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QUESTIONS PRESENTED

I. Whether the Court of Appeals for the Second Circuit followed the standards enunciated by this Court in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986) and in *Harris v. Forklift Sys., Inc.*, 114 S.Ct. 367 (1993) regarding sexual harassment in the workplace.

II. Whether an employer is liable pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, for a "hostile environment" created by a supervisor through the use of the authority delegated to him by the employer.

III. Whether an employer is liable pursuant to Title VII where the employee submits to the unwelcome "*quid pro quo*" sexual advances of the supervisor and suffers no economic detriment.

IV. Whether an employer's express policy against sexual harassment and available complaint procedures insulates the employer from liability pursuant to Title VII where the sexual harassment consisted of a supervisor's exploitation of authority delegated him by the employer.

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Carmon v. Lubrizol, 17 F.3d 791 (5th Cir. 1994) 14

Carrero v. New York City Hous. Auth., 890 F.2d 569 (2d Cir. 1989) 14n, 16

Chamberlin v. 101 Realty, Inc., 915 F.2d 777 (1st Cir. 1990) 16, 17, 18

Davis v. Monsanto Chemical Co., 858 F.2d 345 (6th Cir. 1988), *cert denied*, 490 U.S. 1110 (1989) 13

Dockter v. Rudolf Wolff Futures, Inc., 913 F.2d 456 (7th Cir. 1990) 16

Dornhecker v. Malibu Grand Prix Corp., 828 F.2d. 307 (5th Cir. 1987) 13

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Highlander v. K.F.C. Nat'l Mgmt. Co., 805 F.2d 644 (6th Cir. 1986) 16

Hirschfeld v. New Mexico Corrections Dep't,
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Horn v. Duke Homes, Division of Windsor
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Hunter v. Allis-Chalmers Corp. Engine Div.,
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Jones v. Flagship Int'l., 793 F.2d 714
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Jones v. Wesco Investments, Inc.,
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Lipsett v. Univ. of Puerto Rico,
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Meritor Sav. Bank FSB v. Vinson,
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Saxton v. American Tel. & Tel. Co.,
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Showalter v. Allison Reed Group, Inc.,
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Sparks v. Pilot Freight Carriers, Inc.,

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Steele v. Offshore Shipbuilding Inc.,
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Swentek v. US Air Inc., 830 F.2d 552
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Tomkins v. Public Serv. Elec. & Gas Co.,
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Vinson v. Taylor, 23 Fair Empl. Pra. Cas.
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Statutes and Rules

Title VII of the Civil Rights Act of 1964,
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New York Labor Law § 201-d. 20n

Miscellaneous Authorities

EEOC Policy Guidance on Current Issues of
Sexual Harassment, *EEOC Notice*
No. N-915.035 (Oct. 25, 1988), *reprinted in*
EEOC Compliance Manual (CCH) §3112. 19

National Council for Research on Women,
Sexual Harassment: Research & Resources,
(Hallgarth and Capek, eds., 1992). 21

Restatement (Second) of Agency §§219-237
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No. 93-1674

IN THE

Supreme Court of The United States

OCTOBER TERM, 1993

THE TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK and JOHN BORDEN,

Petitioners,

-vs.-

SHARON KARIBIAN and MARK URBAN,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF IN OPPOSITION

Respondent, Sharon Karibian, opposes the petition of The Trustees of Columbia University in The City of New York ("Columbia University" or "Columbia") for a Writ of

January 25, 1994 in *Karibian v. Columbia University, et al.*, No. 93-7188[1].

In the petition for certiorari, petitioner presents an inaccurate analysis of the holding of the Court of Appeals, thereby greatly overstating its importance. As described herein, certiorari should be denied in this case because:

1) the Opinion does not conflict with any decision of this Court or of any other Court of Appeals;

2) this case does not present special or important reasons for the granting of certiorari; and

3) the Opinion correctly interprets Title VII of the Civil Rights Act as it applies to sexual harassment in the workplace.

STATEMENT OF THE CASE

In 1987, and at all times relevant, Sharon Karibian was a student of Columbia University and worked in its telemarketing office on campus. Mark Urban was employed in 1987 at Teachers College, which is an institution within Columbia. [RS2145][2]

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[1] The decision of the Court of Appeals (herein, the "Opinion") is attached to the petition at Appendix A1 and is reported at 14 F.3d 773 (2d Cir. 1994).

[2] "R" and "RS" refer to pages in the Joint Appendix and Supplemental Appendix, respectively, from the Record before the Court of Appeals.

In or around the spring, 1987, while the parties were in equal positions socially, and were employed in different parts of Columbia, Urban determined to "pursue" Karibian. [R468,151] Karibian's unwavering response at that time was to avoid him. [R188]

In early September, 1987, Urban was appointed Columbia's Development Officer for Annual Giving, which placed him in control of Columbia's telemarketing office, where Karibian worked. Specifically, Urban had the authority to alter Karibian's work schedule and assignments, and to give her promotions and raises. [R153,221,223]

Upon acquiring a position of direct supervisory responsibility over Karibian, Urban continued his pursuit by repeatedly inviting her out to bars, ostensibly to discuss work-related matters. [Pet.A4] On those occasions, Urban often encouraged Karibian to drink, touched various parts of her body and kissed her cheek. [R214-215,250] Starting in January, 1988 Urban made repeated requests that Karibian go with him to his apartment. [R155]

Initially Karibian rebuffed Urban's advances; ultimately, however, she was coerced into a violent sexual relationship with Urban upon his representation that she "owed him" for all he was doing for her as her supervisor. [R231-2,212,298] Thereafter the terms and conditions of Karibian's employment - including her salary, schedule, autonomy and flexibility - varied from time to time depending on her responsiveness to Urban's demands. [Pet.A5] Karibian continued to subject herself to this abusive relationship because she believed she would be fired if she did not give in to Urban's demands. [R277,311]

By September, 1988 Karibian could no longer tolerate Urban's abuse. [R334-5] Accordingly, she followed the procedures outlined in Columbia's sexual harassment bulletin, which purports to protect victims of sexual harassment, but in fact steers them to informal avenues of dispute resolution where their rights and remedies are vaguely defined and minimally addressed. [R66-67] The bulletin provides that a person who is being sexually harassed should "seek a resolution" of the problem through discussion with the person directly concerned; otherwise, she may (1) bring the problem to the attention of a member of the Sexual Harassment Panel, or (2) seek advice from the Equal Opportunity and Affirmative Action office ("EOAA"). *Id.* A Panel member, with the consent of the complainant, may refer the matter to the EOAA and General Counsel for unspecified "further action". A victim is further informed that she may employ "the applicable University grievance procedure. . .including the University Discrimination Grievance Procedure that is available if no other University grievance procedure is specifically applicable." *Id.* How one identifies or pursues the applicable grievance procedure is not disclosed. *Id.*

Karibian complained to Panel member Mary Murphy that her hours had been cut because she was not having sex with her boss anymore and that, in her opinion, there was "a very obvious cause and effect". [R279-280] Karibian inquired what could be done. [R280] Murphy's sole response was to advise Karibian that she should expect to be harassed because she was attractive and that she should just "try to work it out". [R280-1] Murphy made no attempt to mediate a resolution or initiate a formal complaint on Karibian's behalf. [R278-9]

Shortly after her meeting with Murphy, Karibian met with Ruth Curtis, Columbia's Equal Opportunity Coordinator, and

reiterated her claim of quid pro quo harassment. [R402-3] Karibian advised Curtis that Urban had "pursued" her, that he insisted on discussing work-related issues out of the office after hours "over coffee", and that the terms and conditions of her employment changed depending upon her responsiveness to his expressed personal interest in her. [R284-5,350,402-3,417] She stated that during periods when she responded to him personally Urban had given her a raise, extra work, more autonomy, and flexibility in her work schedule. [R367-407] However, once she stopped meeting his demands, Urban became hostile, cut her hours, and terminated her higher level jobs. [RS2372] Karibian stated that she believed her supervisor had made job opportunities available to her in the past as a "bribe", and that she "felt pressured" to respond to him. [R395,406-8,284-5,367] Curtis neither encouraged Karibian to permit an investigation, nor recommended any course of conduct intended to end the harassment. Instead she told Karibian that she had no legal claim. [R282-3]

On January 30, 1990, Karibian met with Gertrude de la Osa, the personnel director, to discuss her continued employment at Columbia. [R242-3] She advised de la Osa that she was afraid of losing her job because Urban was constantly sabotaging her job performance [R246,RS959-965], and threatening to fire her, in retaliation for her refusal to continue a coerced sexual relationship. [R243,RS1420] She stated further that Urban physically abused her, frightened her and forced her to have sex with him. [R246]

On February 23, 1990, Karibian returned to Columbia's EOAA office and described to Curtis what had transpired since their first meeting two years earlier. [R413] Later that same day, Curtis and de la Osa formulated recommendations regarding how to handle the problem. [R431,466] These

recommendations focused in substantial part on Urban's "poor communication skills" and were not formulated pursuant to any investigation. [R417,450,398-416,RS2383,2391] At no time were Karibian's immediate supervisors or co-workers interviewed. Instead, Curtis and de la Osa simply concluded that Karibian was a "woman scorned" and devised recommendations which did not address the harassment. [R466,431,3754-5] In so doing they not only protected Urban but also tacitly approved the continued victimization of Karibian.

Urban was permitted to maintain his position as supervisor of the Telefund office. [R239,373,382] Karibian was stripped of her responsibilities and her position was advertised in the New York Times. [R236-8,372,435-6,463-7] Shortly thereafter, on or about April 16, 1990, Karibian was asked to resign her position, which she refused to do. [R449,376]

Urban's resignation was not sought until three months after Karibian's January 30, 1990 complaint to de la Osa, and then only after Columbia received unsolicited confirmation that Karibian had in fact been subjected to violent, physical abuse by Urban. [R476-7] Despite the evidence of wrongdoing, Columbia offered Urban a letter of reference and severance pay. [R477]

Shortly after Karibian refused to resign, and prior to receipt of the results of a pending audit regarding the viability of Columbia's telemarketing procedures, Columbia terminated its on-campus telemarketing operations for a three month period, and laid off all the workers. [R385-6,459,RS1732-1733] When Karibian was laid off she was not advised that the telemarketing operation would resume or that, according to Columbia's personne' policies, she was entitled to a hiring preference. [RS2284-5]

REASONS FOR DENYING THE WRIT

This case involves no novel issues of federal employment discrimination law requiring consideration by this Court. The Second Circuit Court of Appeals applied this Court's reasoning in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986) and in *Harris v. Forklift Sys., Inc.*, 114 S.Ct. 367 (1993) in holding an employer liable for sexual harassment committed by a supervisor who used the authority delegated by the employer to effectuate the discriminatory conduct. Considering the factual allegations made in this case, the Court of Appeals correctly did not consider the efficacy of the employer's policies and procedures for remedial action in its determination of employer liability.

The Opinion follows established standards for employer liability and basic common law principles of agency. It does not expose employers to any new liabilities, nor require any burdensome or unlawfully intrusive measures. If anything, it provides an incentive for employers to educate their supervising personnel as to an employee's rights under Title VII, and therefore should result in fewer claims of discrimination.

Further, although the Court of Appeals did not reach the question, the Judgment below is also correct because plaintiff's allegations are sufficient to support a finding that Columbia University's policies and procedures were ineffective in providing plaintiff a prompt remedy, and that Columbia's response was retaliatory.

I

THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT

The decision of the Court of Appeals is entirely consistent with this Court's opinions in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986) and in *Harris v. Forklift Sys., Inc.*, 114 S.Ct. 367 (1993). The conflict claimed by petitioner arises only due to a gross misreading of the Opinion and this Court's rulings.

A. Employer Liability for Karibian's Hostile Environment Claim[3]

Contrary to petitioner's assertion, the Court of Appeals did not announce a blanket rule of absolute employer liability in hostile environment cases. Rather, applying agency principles, the Court held that ". . . an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship." Opinion, Pet. A14.

The Court of Appeals specifically distinguished employer liability for *quid pro quo* harassment, which is always

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[3] A hostile work environment occurs "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment,'" *Harris*, 114 S.Ct. at 370 (quoting *Meritor*, 477 U.S. at 65, 67).

imputed to the employer, from that for hostile work environment, which the Court stated requires a specific basis for finding employer liability. Opinion, Pet.A12. The Court found that employer liability was appropriate in this case due to particular allegations raised regarding Urban's use of his supervisory authority:

> The essence of Karibian's hostile work environment claim is that her supervisor capitalized upon his authority over her employment to force her to endure a prolonged, violent and demeaning sexual relationship. If the factfinder accepts Karibian's allegations, Columbia is liable to Karibian because Urban abused his delegated authority to create a discriminatorily abusive work environment.

The Court contrasted this case to cases where a low-level supervisor does not rely on his supervisory authority to carry out the harassment. Under such circumstances ". . . the employer will not be liable unless 'the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it. (citation omitted)" Opinion, Pet.A14.

Thus the Court of Appeals followed the mandate of *Meritor*, 477 U.S. at 72-73, and looked to common law principles of agency for guidance in determining the question of employer liability for Karibian's hostile environment claim and did not impose a standard of absolute liability. Opinion, Pet.A13-15. This reasoning is consistent with this Court's determination that "Congress' decision to define 'employer' to include any 'agent' of the employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor*, 477 U.S. at 72.

Columbia's suggestion that the Opinion contradicts this Court's precedent by its failure to consider the question of the adequacy of Columbia's policies and procedures countering sexual harassment is simply erroneous.[4] This Court specifically warned in *Meritor* that the absence of notice or the employer's provision of a reasonable avenue for notice will not necessarily shield an employer from liability for hostile work environment claims. *Meritor*, 477 U.S. at 72, citing Restatement (Second) of Agency §§219-237 (1958). Applying established agency principles to the facts alleged in this case, the Court did not need to reach the question of the adequacy of Columbia's policies and procedures. In so doing, the Opinion is consistent with this Court's decision in *Meritor*.

B. Karibian's Claim For Quid Pro Quo Sexual Harassment

The Opinion is also consistent with Supreme Court precedent in its finding that Karibian's allegations constitute a claim under the *quid pro quo* theory of sexual harassment despite the absence of economic injury.

Columbia's representations notwithstanding, this Court has firmly and repeatedly rejected the argument that Title VII requires proof of "tangible loss" of "an economic character". *Meritor*, 477 U.S. at 64-65 (noting favorably that the "EEOC Guidelines fully support the view that harassment leading to

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[4] Karibian maintains that consideration of Columbia's procedures in this case would not have affected the Court's ultimate conclusion of employer liability and reversal of summary judgment. Karibian's allegations are more than sufficient to support a finding that Columbia had notice of her complaints and did not provide prompt, remedial action. *See Statement of the Case, supra.*

non-economic injury can violate Title VII"); *Harris*, 114 S.Ct. at 370.

Petitioner compares Karibian's claims to those reviewed in *Meritor* and, without basis, suggests that this Court "did not view [*Meritor*] as a *quid pro quo* case" because the employee had submitted to the sexual advances and suffered no economic detriment or undeserved gain. (Pet. at 9) However, there is no discussion in *Meritor*, either by this Court or the Courts below, concerning the fact that the plaintiff suffered no economic loss. Rather, in *Meritor* the plaintiff's *quid pro quo* claim was dismissed by the District Court after an eleven day trial upon the factual finding that the supervisor had not required "sexual favors as a condition of . . . employment" and that any sexual relationship between the parties "was a voluntary one having nothing to do with [plaintiff's] continued employment . . . or her advancement or promotions . . . " *Vinson v. Taylor*, 23 Fair Empl. Pra. Cas. (BNA) 37, 42 (D.D.C. 1980).

The standard applied by the District Court in *Vinson v. Taylor*, as quoted in this Court's decision on review, does not require a showing of economic loss. "It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as *a condition to obtain employment or to maintain employment or to obtain promotions* falls within protection of Title VII" (emphasis added by this Court, *Meritor*, 477 U.S. at 68). This Court faulted the District Court's analysis for only two errors, neither of which concern the question of economic loss, 1) that the District Court failed to consider the plaintiff's claim under the "hostile environment" theory of sexual harassment, and 2) that the correct focus of inquiry was whether the alleged sexual advances were unwelcome, not whether plaintiff's participation was voluntary.

Moreover, in *Harris v. Forklift Sys., Inc.*, this Court confirmed that the proper focus of inquiry is not the injury suffered by the victim of harassment but rather the alleged harassment itself. *Harris*, 114 S.Ct. at 370 (psychological harm to victim is not required in hostile environment case; the proper question is whether the complained of conduct created an objectively hostile environment and whether the victim subjectively perceived the environment to be abusive).

Thus contrary to petitioner's argument, the Opinion is consistent with Supreme Court precedent.

II

THERE IS NO CONFLICT IN THE CIRCUITS

A. Hostile Environment

Consistent with the mandate of *Meritor*, the Second Circuit applied traditional agency principles in holding that "an employer is liable for the discriminatory abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship." Opinion, Pet.A14. The Court noted that "[i]n contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's co-workers . . ." *Id.*

Columbia asserts that the Second Circuit's decision conflicts with decisions of other Circuits because there the Courts "looked to whether the employer knew or should have known of the alleged harassment, and whether the employer had a

policy and effective procedures designed to allow for prompt, remedial action." [Pet. at 10-11] However, in each of the decisions relied upon by Columbia the harasser was either the plaintiff's co-worker, or, if the harasser was the plaintiff's supervisor, the supervisor did not exercise supervisory authority to further the harassment. Under such circumstances, the questions of notice and an employer's procedures are relevant to the determination of employer liability. Opinion, Pet.A13. *Swentek v. US Air Inc.*, 830 F.2d 552 (4th Cir. 1987) (alleged harasser pilot "did not exercise corporate authority as an instrument for harassment (of stewardess), [h]ence the usual indicia of agency not present"); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d. 307 (5th Cir. 1987) (employer not liable where it responded virtually overnight to allegation of co-worker harassment); *Davis v. Monsanto Chemical Co.*, 858 F.2d 345 (6th Cir. 1988), *cert denied*, 490 U.S. 1110 (1989) (racial harassment by co-workers not a violation of Title VII where the employer did not condone the harassment but took prompt remedial action); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317 (7th Cir. 1992) (employer not liable for harassment where alleged harasser for whom plaintiff did occasional typing was not her supervisor and employer responded to complaint upon its filing); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984) ("sexual harassment by a co-employee not a violation of Title VII unless employer knew or should have known of harassment and failed to take immediate action"); *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572 (10th Cir. 1990) (employer not liable where harasser was not aided by the agency relationship in perpetrating the harassment); *Steele v. Offshore Shipbuilding Inc.*, 867 F.2d 1311, 1317 (11th Cir. 1989) *reh'g denied* 874 F.2d 821 (11th Cir. 1989) (no liability for hostile work environment where harassment did not relate to the supervisor's "supervisory authority", and employer took

prompt remedial action); and *Carmon v. Lubrizol*, 17 F.3d 791 (5th Cir. 1994) (employer not liable where it took prompt and remedial action in response to co-worker harassment).[5]

Columbia's reliance upon *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993) and *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987) is entirely misplaced. In *Saxton* the Court held that the plaintiff's allegations did not establish that the supervisor's conduct was so frequent or severe that it interfered with her work, or that it otherwise created an abusive work environment. The Court then noted that the plaintiff could not prevail in any event because the employer had acted promptly and reasonably in response to her complaint. But that determination was specifically premised upon the Court's finding that the supervisor was not so highly placed in the organization as to be considered the company's agent. Significantly, the Court noted that where the supervisor has the authority to act on behalf of the employer "the employer may be held liable regardless of whether it could reasonably have foreseen or prevented the misconduct, for in that instance the acts of the managerial employee constitute the acts of the employer."

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[5] Columbia's assertion that the Second Circuit's decision conflicts with its previous decisions in *Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992) and *Carrero v. New York City Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989) is similarly without merit. [Pet. p.11 fn.6] In *Carrero* the Court found employer liability based upon plaintiff's *quid pro quo* claim and therefore determined it unnecessary to address the standard of liability under plaintiff's hostile environment claim. In *Kotcher*, a hostile work environment case, the harasser did not use his actual or apparent authority to further the harassment alleged. Accordingly, as the Second Circuit expressly noted, the Opinion is entirely consistent with the Court's decision in *Kotcher*. Opinion, Pet.A16.

Saxton, 10 F.3d at 536 fn.19.

In *Sparks* the Court did not, as Columbia alleges, consider the employer's remedial action, or lack thereof, as relevant to the issue of employer liability. To the contrary, in ruling on plaintiff's hostile environment claim, the Court held that the employer was strictly liable for the discriminatory acts of a supervisor who acted with the employer's actual and apparent authority. *Id.* at 1560. "This liability is direct; the employer cannot find shelter in the claim that it neither had notice of, or approved of, the unlawful conduct." *Id.* at 1559. *Accord*, *Hunter v. Allis-Chalmers Corp. Engine Div.*, 797 F.2d 1417, 1422 (7th Cir. 1986); *Horn v. Duke Homes*, 755 F.2d 599, 604 (7th Cir. 1985); *see Meritor v. Vinson*, 477 U.S. at 72; *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982).

B. *Quid Pro Quo*

In evaluating plaintiff's claim of *quid pro quo* harassment the Second Circuit noted that "[b]ecause the *quid pro quo* harasser, by definition, wields the employer's authority to alter the terms and conditions of employment - either actually or apparently - the law imposes strict liability on the employer for *quid pro quo* harassment." Opinion, Pet.A9. Accordingly the Court held that "[t]he relevant inquiry ... is whether the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances. It is enough to show that the supervisor used the employee's acceptance or rejection of his advances as the basis for a decision affecting the compensation, terms, conditions or privileges of the employee's job." *Id.* at A10.

The Second Circuit's analysis is entirely consistent with

other Circuits, which in *quid pro quo* cases have questioned whether the acceptance or rejection of the harassment is an expressed or implied condition of the receipt or loss of tangible employment benefits. *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 912 (1st Cir. 1988); *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 461 (7th Cir. 1990); *Jones v. Wesco Investments, Inc.*, 846 F.2d 1154, 1156 (8th Cir. 1988); *Jones v. Flagship Int'l.*, 793 F.2d 714, 722 (5th Cir. 1986), *cert. denied* 479 U.S. 1065, 107 S.Ct. 952 (1987); *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 648 (6th Cir. 1986); *see also Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1046-7 (3rd Cir. 1977) (pre-*Meritor*).

Nevertheless, Columbia asserts that the Second Circuit's Opinion is in conflict with other circuits because the Court failed to consider the "employer's policy and procedures and agency principles". [Petition, p.12] On the contrary, the Second Circuit's analysis relied entirely upon agency principles. Citing its prior holdings in *Kotcher* and *Carrero*, the Court noted that it is because the *quid pro quo* harasser, by definition, wields the employer's authority to alter the terms and conditions of employment that the law imposes strict liability on the employer for *quid pro quo* harassment. Opinion, Pet.A9. The Court then considered and rejected altering the strict liability standard in "submission" cases due to the absence of proof of economic harm.

> True, in the typical *quid pro quo* case, the employee who refuses to submit to her supervisor's advances can expect to suffer some job-related reprisal . . . Accordingly, in such "refusal" cases, evidence of some job-related penalty will often be available to prove *quid pro quo* harassment. But that is not to say that such

> evidence is always essential to the claim. In the nature of things, evidence of economic *harm* will not be available to support the claim of the employee who *submits* to the supervisor's demands . . . The supervisor's conduct is equally unlawful under Title VII whether the employee submits or not . . . We do not read Title VII to punish the victims of sexual harassment who surrender to unwelcome sexual encounters. Such a rule would only encourage harassers to increase their persistence.

Id. at A9-10.

The Second Circuit additionally concluded that imposing an actual economic loss requirement in a *quid pro quo* "submission" case would place "undue emphasis on the victim's response to the sexual harassment. The focus should be on the prohibited conduct, not the victim's reaction. While the employee's submission to the supervisor's advances is certainly relevant, it bears only on the issue whether the sexual advances were unwelcome, not whether unwelcome sexual advances were unlawful." *Id.* at A11.

The cases cited by Columbia do not support a contrary result. *Chamberlin v. 101 Realty, Inc.*, *Jones v. Flagship Int'l.*, and *Lipsett v. Univ. of Puerto Rico* are refusal, not submission cases. Moreover, the Courts in *Chamberlin*, *Jones*, and *Lipsett* did not find liability on a *quid pro quo* claim based upon a finding that the employer lacked effective remedial procedures, as Columbia alleges. [Petition at p.12] In both *Chamberlin*, 915 F.2d at 785 and *Lipsett*, 864 F.2d at 901, 905, the First Circuit followed the dictates of *Meritor* and the standard set forth in *Henson v. City of Dundee*, 682 F.2d 897, 908-911 (11th Cir. 1982) and held that the employer was strictly liable for *quid pro quo* harassment. In

Jones, 846 F.2d at 1156 fn.5, the Eighth Circuit affirmed a District Court's finding that the employer had created a hostile work environment.

Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205 (D.R.I. 1991) is also inapposite to Columbia's position. In *Showalter* one plaintiff submitted to the supervisor's sexual demands for a *menage a trois* with him and his secretary for fear of losing his job, while the second plaintiff refused the same demand despite the threat of loss of medical benefits and job opportunities. Citing *Chamberlin* the Court held that both asserted a *quid pro quo* claim, even though neither plaintiff suffered or gained economically for their response to the threats. That standard of liability was not affected by the availability of a grievance procedure, which the Court considered solely in its determination as to whether the plaintiffs had welcomed the sexual advances. *Showalter*, 767 F. Supp. at 1211-1212.

Thus with respect to its conclusions regarding Karibian's claims of *quid pro quo* and hostile work environment, the Opinion is consistent with the decisions of the other Circuits.

III

THIS CASE DOES NOT RAISE IMPORTANT QUESTIONS OF FEDERAL LAW AND IS CONSISTENT WITH THE PURPOSES OF TITLE VII

The Opinion raises no important questions of law that need to be resolved by this Court. Contrary to petitioner's assertion, the Opinion does not contradict established law on employer's liability in sexual harassment cases and does not expand that liability to all claims of supervisory misconduct.

The finding of employer liability in the Opinion is limited to the particular factual allegations of this case, i.e. that Karibian was forced to submit to the sexual perversions of her supervisor as a condition of her continued employment by Columbia, and that the supervisor used his supervisory powers to demand a violent and demeaning sexual association, thereby creating an abusive work environment over a prolonged period of time. Thus the basis for the finding of liability is not simply the harasser's supervisory position, but the harasser's use of authority entrusted him by the employer.

This is entirely consistent with the definition of "employer" in Title VII which includes any "agent" of the employer. Here, where the supervisor wielded his authority as Columbia's agent to extort sexual favors and impose a hostile work environment, his actions are correctly attributed to Columbia. This is not a novel finding. *Cf.* EEOC Policy Guidance on Current Issues of Sexual Harassment, *EEOC Notice* No. N-915.035 (Oct. 25, 1988), *reprinted in* EEOC Compliance Manual (CCH) ¶ 3112 at 3255 (when a supervisor uses a position of authority to harass subordinate, "the employer is liable under both the 'quid pro quo' and the 'hostile environment theories'").

Petitioner argues, based on policy concerns, that even where there is clear agency conduct, Courts should shield an employer from liability if it has issued a policy statement against sexual harassment and provided a reasonable avenue for complaints and remedial action. Petitioner asserts that this exception to traditional agency principles is necessary in sexual harassment cases to provide employers an incentive to take these preventative measures. This argument is without merit. Employers have an incentive to enact policies and complaint procedures because such mechanisms will reduce

the instances of harassment and the damages for which they can be held liable. And, in those cases where the harassment is not connected to an agency relationship, the existence of effective procedures will alleviate the employer from any liability. It would be against public policy to allow an employer to immunize itself from liability for its agents' illegal conduct simply by issuing policy statements which generally oppose the misconduct and by providing procedures for notification of illegal acts. The purpose of Title VII is not only to discourage sexual harassment on the job but also to provide a meaningful remedy when harassment occurs. While the first is laudatory and beneficial to society as a whole, the second is essential to victims such as plaintiff and to the mission of Title VII. Policies and procedures alone are inadequate to protect against the social and economic inequities underlying sexual discrimination when the powers of the employer are used to effectuate the discrimination.

Petitioner further argues that an employer should be allowed to shield itself from liability under basic agency principles in sexual harassment claims because there is a "fine line between purely private relationships between individuals in the workplace and sexual harassment" and because employers cannot impose rules which may infringe upon their employee's privacy rights. (Pet. at 14-15).[6] However, sexual harassment, like any other form of employment discrimination, has little to do with "private relationships" or a person's right to privacy. It is the unlawful treatment of employees based upon their sex in a very public forum, the workplace. Although some cases may

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[6] New York Labor Law Section 201-d (Pet. A35) prohibits an employer from enacting rules against *lawful* associations between employees and has no bearing on an employer's right and duty to prohibit sexual harassment.

present a difficult factual determination as to whether particular conduct is objectively offensive and unwelcome, the divide between sexual harassment and purely private relationships is unambiguous and distinct. Simply stated, when the treatment of an employee is based on the employee's sex and is unwelcome, it is illegal. When an employer has entrusted its authority in an agent who abuses that authority, it is sound policy to hold the employer responsible for the agent's illegal conduct.

Further, it is contrary to the purpose of Title VII to place the burden on the employee to resist sexual blackmail on the job and rely on the employer's complaint procedures. When a supervisor uses the employer's authority he *becomes* the employer *vis-a-vis* the employee, and an employee should not be required to complain to the employer about itself. Studies have shown that victims of sexual harassment are too often coerced into tolerance, and do not make such complaints for reasons of economic need, humiliation and embarrassment, fear of retaliation, and distrust that an employer will effectively respond to a complaint against a supervisor. National Council for Research on Women, *Sexual Harassment: Research & Resources*, (Hallgarth and Capek, eds., 1992). It is the employer, not the victim, who is in the better position both to prevent a supervisor from using his delegated authority to sexually harass a subordinate employee and to pay the cost if such harassment occurs.

CONCLUSION

The Court of Appeals' decision is consistent with Supreme Court precedent and does not conflict with decisions of the other Circuits. The Opinion follows established law and imposes no new liabilities or restrictions on employers. It merely enforces the purposes of Title VII to afford victims of

sexual harassment the protection of law.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1993

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF THE NEW YORK and JOHN BORDEN,
Petitioners,

- vs. -

SHARON KARIBIAN and MARK URBAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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In The

Supreme Court of the United States

OCTOBER TERM, 1993

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and JOHN BORDEN,

Petitioners,

v.

SHARON KARIBIAN and MARK URBAN,

Respondents.

PETITIONERS' REPLY MEMORANDUM

Respondent Sharon Karibian, in her opposing brief in No. 93-1674, seeks to obfuscate a primary issue presented to this Court, which is whether this Court should allow the Court of Appeals for the Second Circuit to disregard this Court's prior directive in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986), that the legal standard for employer liability for sexual harassment is not absolute. As more fully discussed in the Petition for a Writ of Certiorari ("Petition" or "Pet.") filed on behalf of petitioner The Trustees of Columbia University in The City of New York ("Columbia University" or the "University"), this Court should hear this case so that lower courts may continue to consider all relevant factors in determining employer liability, including an employer's policy against sexual harassment and procedures to prevent and promptly remedy such

claims. As this Court previously noted, such policy and procedures are "plainly relevant". *Id.* at 72.

In an apparent effort to distract this Court's attention from the legal issues concerning the standard for employer liability in a "submission" case and the role of an employer's policy and procedures, respondent Karibian seeks to rewrite the "facts" even though her purported factual citations do not survive scrutiny when one looks at the actual record.[1]

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[1] Although respondent's Statement of the Case is replete with incorrect and unsupported statements, no effort is made herein to address all such "facts" inasmuch as factual questions are not at issue before this Court and Columbia University has consistently reserved its rights in this regard. (Pet. at 4, n.1) Nonetheless, three brief examples are illustrative of respondent Karibian's efforts to mask the important legal issues presented by distorting the factual record.

(a) Respondent Karibian would like this Court to believe that Columbia University's response was retaliatory. (Brief In Opposition at 6, 7.) This is simply belied by the undisputed record:

(i) Respondent Karibian admits that after she and all other employees at the Telefund at Columbia University were laid off, she was advised to and did review job postings at the University's Employment Office and chose not to apply for another job at the University (respondent Karibian's deposition, Supplemental Appendix before the Court of Appeals (hereinafter "RS") at RS888-90).

(ii) The District Court held that respondent Karibian "makes a conclusory, totally unsupported allegation that this was in retaliation for her sexual harassment complaint. Columbia has produced conclusive evidence that the Telefund program was canceled for independent business reasons." (Appendix B to the Petition at A23.)

(iii) The Court of Appeals for the Second Circuit concluded that respondent had forfeited, if not abandoned, any retaliatory claim. (Appendix A to the Petition at A7.)

(b) Respondent would like this Court to believe that she told the University's personnel director that "Urban physically abused her, frightened her and forced her to have sex with him." (Brief In Opposition at 5.) Respondent relies on R246 of the record below for this claim. However, if one actually reads R246,

The facts, of course, are not at issue before this Court. Rather, whatever factual scenario is presented to a court, whether in this case or others, the crucial questions presented for determination by this Court concern the legal standard for employer liability for claims of sexual harassment.

It is for this reason that it is important for this Court to grant the petition for a writ of certiorari so that it can determine whether to continue to reject a strict or absolute liability standard in favor of a legal standard that allows lower courts to consider all relevant factors, including the important role of employers' policies and procedures against sexual harassment.

Notwithstanding respondent's claims to the contrary, the Second Circuit's decision in this case does conflict with this Court's prior decision in *Vinson*, and the Second Circuit has created a conflict within the circuits by making employers absolutely liable "regardless of the absence of notice or the reasonableness of [employer's] complaint procedures." (Appendix A to Petition at A14.)[2]

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it is readily apparent this is not supported by that record cite, and no such testimony exists.

(c) Respondent would like this Court to believe that Urban cut her hours and terminated her higher level jobs. (Brief In Opposition at 5.) This is also unsupported by the record below. Moreover, if true, then Karibian would have presented a more typical "refusal case coupled with actual loss of economic benefit" and it would have been unnecessary for the Second Circuit to create a new standard of absolute liability.

As noted above, these examples are presented to demonstrate to this Court that respondent has taken liberties with the fact record in an effort to detract from the important legal issues presented.

[2] Respondent's mischaracterization of case law also does not survive scrutiny. By way of illustration, respondent takes a footnote in *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993), out of context and misconstrues *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987), (Brief In Opposition at 14) in an effort to create the incorrect impression that other courts have utilized

Respondent also misses the point by arguing that no showing of economic loss is required in a *quid pro quo* "submission case". (Brief In Opposition at 10-12.) Rather, where there is no economic loss and therefore no absolute determination of agency responsibility can be made, the issue is whether all relevant factors, including the employer's policy and procedures, should be considered in determining whether liability can attach to the employer. (*See* Petition at 12-13.)

The importance of the legal standard of employer liability, and the roles of employers and employees, in this sensitive area of sexual relationships and sexual harassment claims is more fully discussed in the Petition and the briefs submitted by *amicus curiae* and proposed *amici curiae*. The Second Circuit's conflict with this Court and other Circuits, the important legal issues presented, the impact of those issues on employment and personal relations, and the significance of employment discrimination claims to the business of the federal courts, all warrant consideration of this case by this

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a strict liability standard. One need only read the text prior to such footnote in *Saxton* to understand that the Seventh Circuit reviewed all relevant factors in that case and stated, "But Title VII requires only that the employer take steps reasonably likely to stop the harassment (citations omitted)." *Saxton*, 10 F.3d at 536. Similarly, in *Sparks*, the Eleventh Circuit found that *Vinson* had no bearing on that appeal because that employer had proffered no evidence of a policy or effective grievance procedures. *Sparks*, 830 F.2d at 1560.

Court. Accordingly, it is respectfully submitted that this Court should grant the Petition and issue a Writ of Certiorari to The Court of Appeals for the Second Circuit.

Respectfully submitted,

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May 26, 1994

EDITOR'S NOTE

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No. 93-1674

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On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI*

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae*. In support of this motion, the Chamber shows as follows:

1. This motion is necessitated by the refusal of counsel for Respondent, Sharon Karibian, to consent to the filing of a brief by the Chamber. Counsel for Respondent, Mark Urban, and counsel for Petitioners, Columbia University and John Borden, have consented to the filing of this brief. Those letters of consent are being filed simultaneously with this motion and brief.

2. The Chamber is the largest federation of business companies and associations in the world. With substan-

tial membership in each of the 50 states, the Chamber represents approximately 220,000 businesses and organizations and serves as the principal voice of the American business community.

3. An important function of the Chamber is to represent the interests of its members in significant employment matters before this Court, the lower courts, the United States Congress, the Executive Branch and the independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in a wide spectrum of employment litigation. E.g., *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Hazen Paper Co. v. Biggins*, —— U.S. ——, 113 S. Ct. 1701 (1993); and *Landgraf v. USI Film Products, Bonar Packaging, Inc. and Quantum Chemical Corporation*; *Rivers v. Roadway Express, Inc.*, —— U.S. ——, 114 S. Ct. 1522 (1994).

4. The Chamber's members have a fundamental interest in the issue presented by this case. As employers, Chamber members are vitally concerned with their responsibilities and duties under Title VII, and are dedicated to eliminating sex discrimination in the workplace. The decision of the court of appeals in this case, however, constitutes an unwarranted extension of Title VII to areas beyond the employer's control. By imposing liability on an employer for the purely personal conduct of a supervisor—of which the employer had no knowledge, and which was directly contrary to the employer's express policies—the court of appeals placed an impossible burden on employers. It has, in effect, created a standard of "strict liability" in sexual harassment cases from which employers, despite aggressive sexual harassment policies, cannot escape.

5. In response to this Court's decision in *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986), the Chamber, and many of its members, have established extensive

policies and programs to deal with sexual harassment in the workplace. These policies and programs are designed to quickly resolve complaints of sexual harassment without the necessity of lengthy administrative and court proceedings. The Second Circuit's rule eliminates any inducement for employers to establish productive sexual harassment policies for their workforces and is contrary to well-settled principles established by this Court. Thus, Chamber members have a fundamental interest in ensuring that the petition for writ of *certiorari* be granted and the decision of the U.S. Court of Appeals for the Second Circuit reversed.

WHEREFORE, the Chamber respectfully requests that it be granted leave to file the accompanying brief *amicus curiae* in support of the Petitioners, Columbia University and John Borden.

Respectfully submitted,

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QUESTION PRESENTED

Whether an employer is strictly liable pursuant to Title VII of the Civil Rights Act of 1964 for actions that allegedly arose from a supervisor's sexual harassment of an employee where the employer has a policy specifically against sexual harassment and effective procedures available to complainants that provide prompt remedial action.

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI*

INTEREST OF THE *AMICUS CURIAE*

The interests of the Chamber of Commerce of the United States of America (the "Chamber") in this matter are set forth in the accompanying Motion for Leave to File Brief as *Amicus Curiae*.

STATEMENT OF THE CASE

Respondent, Sharon Karibian, was a part-time adult student at Columbia University's School of General Studies, and a part-time clerical worker in 1986 at "Telefund at Columbia." The Telefund program was a fundraising program operated under the aegis of Columbia Univer-

sity's Office of University Development and Alumni Relations ("UDAR"). The program was administered by an outside consultant, Philanthropy Management, Inc. ("PMI"). During the course of her employment, Karibian progressed from clerical worker to Project Director, which was the highest position at the Telefund program. Each promotion, and accompanying raise, was based solely on merit.

In the Spring of 1987, Karibian became involved in a sexual relationship with Respondent, Mark Urban. Later that year, in September 1987, Urban accepted a job with UDAR at Columbia University. In the Fall of 1989, when Karibian was promoted to Project Director of the Telefund program, Urban became her direct supervisor. Karibian's relationship with Urban also ended in 1989.

Columbia University has an established mechanism for dealing with sexual harassment. Columbia publishes a bulletin entitled "Protection Against Sexual Harassment." This bulletin expressly states that the "University prohibits sexual harassment of any member of the Columbia community," and also describes the remedies provided by the University if allegations of sexual harassment arise. An individual who believes that he or she is being sexually harassed has several options with which to pursue the allegations. The individual can confer with a member of the University Panel on Sexual Harassment or discuss the problem with the University's Office of Equal Opportunity and Affirmative Action ("EOAA"). Both of these processes are entirely confidential. A party alleging sexual harassment also has the option of filing a grievance under the University's grievance procedure. This procedure is not confidential and sets in motion an investigation and other steps which may lead to remedial action against the alleged harasser.

In 1988, Karibian consulted with one of the members of the Sexual Harassment Panel and also with an employee at the EOAA to discuss allegations that she was

being sexually harassed by Urban. At the conclusion of these discussions, Karibian specifically requested that there be no investigation of the allegations.

On January 30, 1990, Karibian complained to the Director of Development Services at UDAR that Urban was undermining her in her job as Project Director of Telefund since her sexual relationship with Urban had ended. As a result of this complaint, Columbia University promptly removed Urban as Karibian's supervisor and commenced an investigation into her sexual harassment claims. During the course of the investigation, Urban was asked to, and did, resign.

In 1990, Karibian filed suit against Columbia University, John Borden [1] and Mark Urban in the U.S. District Court for the Southern District of New York alleging a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The district court awarded summary judgment in favor of Columbia University, holding that Karibian had not established a case of sexual harassment based on either the *quid pro quo* theory or the hostile environment theory of sexual harassment.[2]

On appeal, the U.S. Court of Appeals for the Second Circuit reversed the district court's judgment and ordered the case remanded for further proceedings. The court of appeals held that when a complainant "submits" to a supervisor's alleged sexual advances, the employer is strictly liable under the *quid pro quo* theory for the con-

---

[1] John Borden has been Deputy Vice President of UDAR since April 1988, and, as such, was Urban's supervisor.

[2] Sexual harassment in the workplace falls into two categories. First, *"quid pro quo"* harassment where a supervisor demands sexual consideration in exchange for job benefits. B. Lindemann and D. Kadue, *Sexual Harassment in Employment Law*, 129 (1992). Second, "hostile environment" harassment where conduct is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, —— U.S. ——, 114 S. Ct. 367 (1993).

duct regardless of whether the plaintiff proved economic or job related loss. In addition, the court held that the employer is also strictly liable for a supervisor's alleged conduct under the "hostile environment" theory regardless of the absence of notice or the reasonableness of an employer's sexual harassment policy and complaint procedure. Columbia University now petitions this Court seeking reversal of the decision of the court of appeals.

INTRODUCTION

This brief focuses on the single issue of employer liability for the actions of supervisors in sexual harassment cases. There is no dispute among the parties that employers have an obligation to maintain a workforce free from sexual harassment. The key question presented by this case is whether an employer is insulated from liability when it makes substantial effort, by establishing a comprehensive policy and procedure, to deter sexual harassment in the workplace. Without resolution of this important question, employers will have no incentive to implement these policies which serve the preventive purpose of Title VII.

I. THE PETITION FOR *CERTIORARI* SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S STRICT LIABILITY STANDARD IS CONTRARY TO THIS COURT'S RULING IN *MERITOR SAVINGS BANK FSB v. VINSON.*

This Court has previously held that, in sexual harassment cases, employers are not automatically liable under Title VII of the Civil Rights Act of 1964 for harassment of employees by their supervisors without regard to the circumstances of a particular case. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986). Instead, the Court held that Congress intended the courts to look to agency principles for guidance with regard to employer liability for sexual harassment of employees by their superiors. *Vinson* at 72. By applying agency principles,

the Court demonstrated an intent to "place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.* More specifically, the Court determined that the existence of a policy prohibiting sexual harassment in the workplace, and a procedure to implement such a policy was "plainly relevant" to a determination of employer liability for a supervisor's behavior. *Id.*

The plaintiff in *Vinson* was employed by a bank for approximately four years. During the course of her employment, she received several merit based promotions, but was eventually discharged for taking sick leave for an indefinite period of time. The plaintiff then brought an action against the bank, and her supervisor at the bank, claiming that during her employment at the bank she had been subject to sexual harassment by her supervisor in violation of Title VII of the Civil Rights Act of 1964. In addition to recognizing the "hostile environment" theory of harassment, this Court expressly noted that employers are not strictly liable for sexual harassment of employees by their supervisors.

One factor critical to the Court's decision in *Vinson*, was the employer's lack of a specific sexual harassment policy and procedures to implement a policy. The Court found that the bank's general nondiscrimination policy did "not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination." *Vinson* at 72-73. Moreover, the Court deemed the bank's grievance procedure inadequate because employees had no alternative to voice charges of discrimination but to complain directly to their supervisors.

The instant case presents this Court with an entirely different situation than in *Vinson*. Columbia University, unlike Meritor Savings Bank, has a multi-faceted sexual harassment policy that addresses all aspects of a sexual harassment allegation. In addition to a blanket prohibi-

tion on sexual harassment, the university provides individuals with both confidential, and more formal investigatory, procedures with which to pursue complaints of harassment. For example, an individual can select from options such as counseling, mediation, investigation, and a formal grievance procedure to resolve allegations of harassment. The university also has a twenty-six member panel that is available to complainants, and an Office of Equal Opportunity and Affirmative Action. The Second Circuit simply ignored the existence of this comprehensive remedial scheme and created a strict liability standard for employers that is contrary to this Court's ruling in *Vinson*.[3]

Furthermore, the Second Circuit's decision is at odds with the decisions of other circuits, which have recognized that prompt remedial action—combined with a formal anti-harassment policy—can insulate an employer from liability in sexual harassment cases.[4] For example, in *Reed v. Delta Air Lines, Inc.*, No. 93-5031, 1994 U.S. App. LEXIS 3485 (6th Cir. 1994) (*per curiam*), the Sixth Circuit rejected a strict liability standard in cases where supervisors sexually harass employees. The plaintiff in *Reed*, a reservation desk operator with Delta, sued the company under the Tennessee Human Rights Act[5] alleging that her supervisor had refused to recommend

[3] The Chamber agrees with petitioner that the analysis of whether an employer is liable for alleged supervisor harassment, which depends on agency principles, is applicable under both the hostile environment and *quid pro quo* theories of sexual harassment. *See* Petition for Writ of *Certiorari* at 10-12.

[4] As Petitioners note, the Second Circuit's decision is in conflict with the decisions of other federal courts that have addressed the issue of employer liability for the actions of supervisors in hostile environment and *quid pro quo* sexual harassment cases. *See* Petition for Writ of *Certiorari* at 10-14.

[5] The standard of employer liability in sexual harassment cases is the same under § 4-21-401 of the Tennessee Human Rights Act and § 2000e-2(a)(1) of Title VII of the Civil Rights Act of 1964.

her for a flight attendant's position unless she had sexual intercourse with him. The court held that Delta was not liable for the supervisor's alleged sexual harassment because the company had taken immediate and effective remedial action by firing the supervisor as soon as Delta had notice of the wrongdoing. Unlike the Second Circuit, the Sixth Circuit adopted a standard of liability that credited the employer for responding adequately and effectively to allegations of sexual harassment.

Similarly, the Fifth Circuit has twice held that employers are not liable when they take prompt and appropriate remedial action in response to allegations of sexual harassment of an employee by a superior. *Carmon v. Lubrizol Corporation*, No. 92-2964, 1994 U.S. App. LEXIS 5956 (5th Cir. 1994), and *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir. 1987). Most recently, in *Carmon*, the plaintiff complained to her employer on two occasions that she had been subject to a hostile working environment because her supervisor used vulgar language and asked her questions about her sexual activities. The court held that the company could not be held liable for the supervisor's actions because it took immediate, and suitable, remedial action in response to the allegations. In particular, the court noted that the company interviewed the plaintiff, interviewed six witnesses, reprimanded and transferred the supervisor, and distributed a memorandum on the ill effects of sexual harassment in the workplace. These actions, the court determined, evidenced a strong intent to free the workplace of the alleged harassment and divested the company of liability.

Similarly, in *Dornhecker*, an employer's prompt response to an employee's claim of sexual harassment shielded the employer from liability under Title VII. There, the plaintiff brought a Title VII action alleging that one of the company's contract consultants created a hostile work environment during an out-of-town company meeting. The plaintiff brought her allegations directly to the president

of the company who immediately eliminated contact between the plaintiff and the consultant. According to the Fifth Circuit, then, the employer's prompt remedial action was the key factor in determining employer liability for sexual harassment of the employee by supervisor.

Thus, evidence that the employer has established a strong policy forbidding sexual harassment, has communicated this policy to employees, and has disciplined those who disregard the policy, should divest the employer of liability for the unauthorized conduct of a supervisor. The Second Circuit has, however, ignored these mitigating factors—placing it in conflict with other circuits—and developed a strict liability standard that demands review by this Court.

II. THE SECOND CIRCUIT'S STRICT LIABILITY STANDARD IMPEDES THE DEVELOPMENT OF SEXUAL HARASSMENT POLICIES THAT WORK TO THE BENEFIT OF EMPLOYERS AND EMPLOYEES.

Columbia University's petition should be granted because the Second Circuit's strict liability standard inhibits the development of policies designed to combat sexual harassment in the workplace. A central purpose of Title VII is to prevent sexual harassment from permeating the workplace. Equal Employment Opportunity Commission Guidance on Current Sexual Harassment Issues, 8 Fair Empl. Prac. Manual (BNA) 405:6699 (Mar. 19, 1990). Employers have met this goal by implementing comprehensive sexual harassment policies and procedures. These policies not only serve Title VII's directive, but offer prompt remedial relief to the complainants of the alleged harassment.

The Chamber urges this Court to credit the employer community for a substantial effort to eradicate sexual harassment in the workplace through the implementation of sexual harassment programs. While individual policies

may differ, the Chamber, and its members, have generally adopted programs containing the following four elements:

- a written policy provided to all employees stating that sexual harassment of any kind will not be tolerated in the workplace;

- internal procedures for dealing with sexual harassment complaints, quickly, fairly, and thoroughly. These procedures generally give employees alternative avenues for filing their complaints so that they have the option of complaining to a man or woman, and are not forced to complain to their immediate supervisor who may be part of the problem;

- training programs so that all employees understand what constitutes sexual harassment, the company's policy and how to file a complaint. Supervisors are trained on how to handle complaints; and

- prompt investigations of all complaints. Those found to have engaged in sexual harassment are subject to discipline in a manner consistent with the severity of the violation. The resolution of the matter is then fully explained to the complainant.[6]

The Second Circuit's strict liability standard undermines the effectiveness of a comprehensive sexual harassment policy like the one described above. First, the Second Circuit's decision discourages employers from assuming the expense and administrative burden of implementing such a procedure. For larger companies, the development of a sexual harassment program involves considerable time on the part of the personnel department and often the general counsel's office. For a small business, with a

[6] The Chamber acknowledges that some employers may have adopted inadequate sexual harassment policies. *See Vinson* at 73. (Employer's policy held inadequate because employee could only complain to direct supervisor who was the perpetrator of the alleged harassment). The Chamber is simply encouraging this Court to recognize that the existence of a policy and procedure is plainly relevant to a determination of employer liability in sexual harassment cases.

modest or non-existent human resource or legal department, outside consultants must be hired to design a policy. In both instances, employers spend considerable time and money implementing a comprehensive sexual harassment policy. By ignoring the existence of sexual harassment procedures when considering employer liability for the actions of supervisors, the Second Circuit has obliterated any incentive employers have to absorb the expense of these programs.

Second, the court of appeals decision has the effect of prolonging the investigation—and more importantly, the final resolution—of a sexual harassment allegation. A sexual harassment policy places the burden on the employer to quickly investigate any allegation of harassment, to separate the complainant from the alleged harasser, to interview witnesses, and to resolve the matter before it has a negative effect on the rest of the workforce. Without such a policy, employers will have less of an incentive to concentrate staff time on the completion of an investigation until formal charges are brought or litigation ensues.

Third, the Second Circuit's strict liability standard discourages employees from protecting themselves in the event that sexual harassment occurs. Most sexual harassment policies contain a mechanism through which employees can pursue their complaint. These type of procedures empower an employee to protect himself or herself against harassment. Employees need not continue to be victimized by supervisors or co-workers. If the Second Circuit's strict liability standard is not reviewed by this Court—and employers cease to develop harassment policies—employees will lose important avenues for pursuing their complaints.

Finally, the existence of in-house sexual harassment procedures encourages private resolution of disputes, and eliminates the growing burden that sexual harassment cases place on the federal agencies and the judiciary.

Title VII specifically requires the Equal Employment Opportunity Commission (EEOC) to "eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). In addition, the Civil Rights Act of 1991 favors the private resolution of disputes, including the use of mediation, factfinding, or negotiations. Pub. L. No. 102-166, 105 Stat. 1981. The Second Circuit's decision clearly disregards this statutory language because it inhibits an employer's incentive to adopt resolution mechanisms as part of a sexual harassment policy and program.

Moreover, by discouraging alternative means of resolving disputes, the court's decision increases the burden on the EEOC as the arbiter of sexual harassment disputes. Recent information from the EEOC indicates that there has been a substantial increase in the number of sexual harassment charges filed with the agency. In 1993, 8.3% of all charges filed with the agency contained the issue of sexual harassment.[7] This represents a 28.7% increase over the number of charges filed in 1992 containing sexual harassment allegations.[8] The Second Circuit's decision simply ignores the fact that sexual harassment policies and programs would quickly resolve complaints of harassment and reduce the burden these cases place on the federal agencies and the judiciary.

Thus, by imposing liability on an employer for the purely personal conduct of a supervisor, which was directly contrary to the employer's express policy, the Second Circuit has placed an impossible burden on employers. As Petitioner notes, a case-by-case analysis of whether an employer should be liable for the alleged sexual harassment of an employee by a superivsor is more consistent

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[7] U.S. Equal Employment Opportunity Commission News Release, January 12, 1994.

[8] *Id.*

with the purposes of Title VII than the strict liability standard adopted by the Second Circuit. Such a case-by-case analysis creates an inducement for employers to establish comprehensive sexual harassment policies that work to the benefit of employers and employees.

CONCLUSION

For the foregoing reasons, the Chamber urges the Court to grant the petition for writ of *certiorari*.

Respectfully submitted,

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MAY 20 1994

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No. 93-1674

In The

Supreme Court of the United States

October Term, 1993

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and JOHN BORDEN,

Petitioners,

- vs. -

SHARON KARIBIAN and MARK URBAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION OF THE COMMISSION ON INDEPENDENT COLLEGES AND UNIVERSITIES *(cIcu)* FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rules 37.1 and 37.2 of the Rules of this Court, the Commission on Independent Colleges and Universities (*"cIcu"*) respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of Petitioners, The Trustees of Columbia University in The City of New York and John Borden. In support of this motion, ***cIcu*** shows as follows:

1. This motion is necessitated by the refusal of consent of counsel for the Respondent Sharon Karibian to the filing of ***cIcu***'s brief *amicus curiae* in this case. The letters of consent of Petitioners, The Trustees of Columbia University in The City of New York and John Borden, and Respondent Mark Urban, are being filed simultaneously with this motion and brief, pursuant to Rule 37.2 of this Court.

2. ***cIcu*** is a voluntary membership organization, eleemosynary in nature, and represents the presidents of 111 independent colleges and universities in New York State. ***cIcu***'s mission is thus to speak as the collective voice of its member colleges and universities in matters involving public policy affecting higher education, carrying forth those public policies its member presidents have determined affect the individual and the collective missions of these independent college and university campuses.

3. All of ***cIcu***'s member colleges and universities will be affected by the decision reached by the Court of Appeals for the Second Circuit in *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir. 1994), in responding to incidents of sexual harassment pursuant to: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*; Title IX of the Higher Education Act of 1972, as amended, 20 U.S.C. §§ 1681, *et seq.*; and the guidelines of the Equal Employment Opportunity Commission ("EEOC"), *Equal Employment Opportunity Commission Policy Guidance on Current Sexual Harassment Issues*, 8 Fair Empl. Prac. Manual (BNA) 405:6681 (March 19, 1990).

4. The instant case presents a decision by the Court of Appeals for the Second Circuit which is contrary to this Court's holding in *Meritor Sav. Bank FSB v. Vinson*, 447 U.S. 57 (1986), and which is in conflict with all other Circuits which have spoken on the issue. *See Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir. 1987); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317 (7th Cir. 1992); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984); *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572 (10th Cir. 1990); and *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989).

5. ***cIcu***'s members have a fundamental interest in this case inasmuch as colleges and universities are concerned with their responsibilities under Titles VII and IX and the guidelines of the EEOC. Their policies and procedures with regard to sexual harassment are designed to prevent and promptly remedy alleged harassment.

6. The Second Circuit's decision will undermine, through the imposition of a standard of strict liability for employers, the proactive, curative effect of specific procedures and policies developed and implemented by colleges and universities in New York State, as well as those within the greater purview of the Second Circuit, for dealing with sexual harassment. Without an examination of the relevant facts and circumstances surrounding these cases, this Court's reasoned holding in *Meritor* for resolving the complex issues inherent in sexual

harassment cases will be undermined, as will the import of Title VII, Title IX and the guidelines of the EEOC.

7. As the Court of Appeals for the Fifth Circuit has most recently determined, to hold an employer strictly liable for the acts of its supervisory employees after said employer has utilized prompt and effective procedures and policies to stop the harassment, "would produce truly perverse incentives benefiting no one, least of all the actual or potential victims of sexual harassment." *Carmon v. Lubrizol Corp.*, No. 92-2964, 1994 U.S. App. LEXIS 5956, at *13.

8. The Second Circuit stands alone among the Circuits in contrast to this Court's holding in *Meritor*, and its decision is a radical departure from well-established principles for dealing with sexual harassment which this Court has directed be applied in such cases. *Meritor*, 477 U.S. at 72.

9. Moreover, the decision of the Second Circuit would affect the rights and responsibilities of colleges and universities under New York's Labor Law § 201-d (McKinney 1994), and would also unnecessarily intrude on the traditional rights of freedom of speech, as guaranteed by the Constitution, in the academic setting. This "free marketplace of ideas" has made America's colleges and universities the envy of the free world, and must not be abridged.

WHEREFORE, ***cIcu*** respectfully requests it be granted leave to file the accompanying brief

amicus curiae in support of the Petitioners, The Trustees of Columbia University in The City of New York and John Borden.

Dated: Albany, New York
May 20, 1994

Respectfully submitted,

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- vs. -

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF THE COMMISSION ON INDEPENDENT COLLEGES AND UNIVERSITIES *(cIcu)* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Commission on Independent Colleges and Universities (*"cIcu"*) represents 111 independent colleges and universities in New York State. As *amicus curiae*, ***cIcu*** submits this brief in support of the Petition of The Trustees of Columbia University in The City of New York ("Columbia University") and John Borden for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, to review the decision and judgment

dated January 25, 1994 in *Karibian v. Columbia University, et al.*, No. 93-7188.

INTEREST OF THE *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

The Commission on Independent Colleges and Universities (***cIcu***) is a voluntary consortium of 111 nonprofit, degree-granting, independent institutions of higher learning in New York State. It is the coordinating body and public policy forum for these institutions. Chartered by the New York State Board of Regents, ***cIcu*** is a private eleemosynary educational corporation. It provides the independent-sector framework for the presidents of New York's independent colleges and universities to determine those public policies they believe will best advance the individual and collective missions of these campuses. Located in Albany, New York, ***cIcu***'s mission, together with its affiliate, the New York State Coalition for Independent Colleges and Universities, is to articulate these policies, in appropriate fora, to best advance the collective interests of these member institutions and to maintain their independence. (A listing of the members of ***cIcu*** is attached herein as an Appendix.)

The Second Circuit Court's decision in the case of *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir. 1994), has articulated a new standard of strict liability against employers for acts of sexual harassment committed by supervisors, regardless of whether the employer had

actual or constructive notice of the conduct of the supervisor, and regardless of whether the employer had effective procedures and policies in place to investigate and resolve such claims. This ruling is contrary to the pronouncement of this Court in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986). The Second Circuit's decision also determined that prompt and effective action by the employer to stop the harassment and to discipline the harasser will not operate to relieve the employer of strict liability for the acts of the employee. *Karibian, Id.* Without reinforcement of the *Meritor* decision, all employers within the purview of the Second Circuit will be subject to this untenable standard of strict liability and will have no incentive to enact or follow through with effective policies and procedures to deter sexual harassment and to resolve sexual harassment complaints when they arise.

The instant case is solid in that all necessary and prudent steps were taken by the University upon its having knowledge of the situation upon which it could act. As the District Court noted, once Columbia University had notice, it acted with dispatch. *See Karibian v. Columbia University*, 812 F. Supp. 413, 417 n.6 (S.D.N.Y. 1993); *See also* Columbia University's *Petition for a Writ of Certiorari, Karibian v. Columbia University* (No. 93-1674) ("Petition of Columbia University") at 4, 5.

The Second Circuit's holding in this case, specifically, that a standard of strict liability shall be applied to employers for acts of sexual harassment by their supervisory employees, without an examination of the relevant facts and circumstances surrounding the case, is of great concern to the independent colleges and universities in New York State, for it has the power to significantly

undermine– and perhaps destroy– the sound and rational pronouncement of this Court in *Meritor* and further, to intrude on the efforts and advancements made by these institutions in developing, implementing and enforcing effective policies and procedures on sexual harassment pursuant to the guidelines developed in *Meritor*, the requirements of Title VII, Title IX and the EEOC. 477 U.S. 57 (1986); 42 U.S.C. §§ 2000e, *et seq.*; 20 U.S.C. § 1681; *Equal Employment Opportunity Commission Policy Guidance on Current Sexual Harassment Issues*, 8 Fair Empl. Prac. Manual (BNA) 405:6681 (March 19, 1990).

The Second Circuit's holding could also force employers to intrude into private social relationships among employees. *Cf.* N.Y. Labor Law § 201-d (McKinney 1994). Further, application of the Second Circuit's standard of strict liability could abridge traditional academic freedoms and rights of free speech which are vital to the college and university marketplace of ideas and protected under the Constitution.

ARGUMENT

Inasmuch as the Second Circuit's decision is contrary to this Court's prior directives, and will significantly undermine the role of sexual harassment policies and procedures at colleges and universities, we urge this Court to grant the Petition of Columbia University and hear this case, for it has far reaching impact on all employers.

In view of the Second Circuit's departure in this case from this Court's decision in *Meritor* and its progeny in

the various other Circuits (*See* cases cited in Petition of Columbia University at 10, 11: *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir. 1987); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317 (7th Cir. 1992); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984); *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572 (10th Cir. 1990); and *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989); *see also Carmon v. Lubrizol Corp.*, No. 92-2964, 1994 U.S. App. LEXIS 5956 (5th Cir. 1994); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987)), this Court must review the decision of the Second Circuit and restore a case-by-case analysis which takes into account effective procedures and policies utilized by employers to preserve, restore and protect harassment-free work environments.

The sexual harassment case is far too complex (and far too important and dispositive are the actions the employer has taken in this case to protect all parties involved– be they alleged victim or alleged harasser) to allow the detrimental outcome reached below in this case to stand. We must strenuously urge, therefore, that the analysis provided for in *Meritor* be maintained to assure careful, case-by-case determination of the adequacy of procedures in place to protect all parties and to foster a work environment free from sexual harassment. Where effective policies and procedures are in place, it would benefit no one to ignore the important role of these procedures and policies in sexual harassment cases. Moreover, as the Fifth Circuit has most recently held in

the *Carmon* case, to deem the employer liable after prompt corrective action "would produce truly perverse incentives benefiting no one, least of all the actual or potential victims of sexual harassment." *Carmon v. Lubrizol Corp.*, No. 92-2964, 1994 U.S. App. LEXIS 5956, at *13.

This Court concluded similarly in *Meritor* that the Court of Appeals for the District of Columbia Circuit "erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Meritor*, 477 U.S. at 72; *see generally* Restatement (Second) of Agency §§ 219-237 (1958). The Court of Appeals for the Second Circuit has plainly erred in precisely the same manner in the instant case, disregarding the existence of full and adequate procedures to dispel any apparent authority of the supervisor and further, by disregarding the utilization of the procedures and policies in place for the remediation of the proscribed conduct. *Karibian*, 14 F.3d at 780. In contrast, the Eleventh Circuit, in the *Sparks* case, involving both *quid pro quo* and hostile environment claims, noted an employer may divest the harasser-supervisor of actual or apparent authority by developing and utilizing policies and procedures which operate to prevent and correct acts of sexual harassment. *Sparks*, 830 F.2d at 1560. However, the Second Circuit, in the instant case, ignored completely the important role of effective policies and procedures.

Here, the policies and the procedures employed by Columbia University are such that they are consistent with the guidance offered by the EEOC regarding its recommendation for the appropriate application of

agency principles as enunciated in the *Meritor* Opinion of this Court:

> [where there is] a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, [when] that procedure was reasonably responsive to the employee's complaint . . . the employer should be shielded from liability. . . .

Brief for United States and EEOC as *Amici Curiae* in *Meritor*, at 26.

Conversely, the EEOC also said:

> [The] employer will be liable if the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials.

Id.

In the instant case, Columbia University had appropriate procedures and policies in place for reporting such incidents and such avenues were utilized by the Respondent. Further, when the Respondent voiced her complaint to Columbia University, she was separated from the alleged harasser. Investigation and effective remedial action promptly followed. *See* Petition of Columbia University at 4, 5. These actions are consistent with EEOC Guidelines and the Opinion of this Court in *Meritor*. The *Meritor* decision held "that the Court of Appeals [for the District of Columbia Circuit] was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, *regardless of*

the circumstances of a particular case." 477 U.S. at 73 (emphasis added).

Today's emerging standards of equality and individual autonomy demand nothing less than a framework for dealing with sexual harassment which allows for and, in fact, encourages, as warranted: the employer to take action to protect; the employee to take action to speak out; and the supervisor employee to take action to act appropriately– in a manner consistent with the goals of our society– freedom, equality and personal autonomy. Indeed, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, is designed to create and to protect "workplace equality." *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993).

Title VII requires employers to take steps to prevent and remediate in cases of sexual harassment. Higher education institutions are additionally bound under Title IX of the Higher Education Amendments of 1972. 20 U.S.C. §§ 1681, *et seq.* These statutory protections, and the guidance afforded by this Court in *Meritor* regarding agency principles and the role of policies and procedures, are at the heart of this case. Title VII does not operate, nor should it, to impose strict liability on employers, regardless of the circumstances of a particular case. *Meritor*, 477 U.S. at 73. Cases involving this most sensitive subject must be permitted a case-by-case determination and no broad, sweeping rule may ensure equality of treatment for all, least of all the victims of such improper acts.

In a case such as this, where Columbia University had in place multi-leveled policies and avenues for

response, it would not only be bizarre to impose a standard of strict liability, but would, as a practical matter, operate to undermine alleged victims by chilling their opportunity and duty to come forward in a safe and open environment to stop such abuse. The EEOC has stressed that an important part of any "effective preventive program" should be the inclusion of a procedure designed to "encourage victims of harassment to come forward." *Equal Employment Opportunity Commission Policy Guidance on Current Sexual Harassment Issues*, 8 Fair Empl. Prac. Manual (BNA) 405:6681 (March 19, 1990).

The Second Circuit's decision imposing strict liability on employers would operate to the detriment of victims by removing the incentive to employers to act diligently and intelligently in their behalf. Faced with *strict* liability with regard to alleged victims on the one hand, and *potential* liability with regard to wrongful or constructive discharge of alleged harassers on the other, employers would be placed in an untenable position *vis a vis* the relevant statutory schemes and the practicalities of employer responsibility.

Prior to the instant case, the Second Circuit followed the *Meritor* analysis in *Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59, 63 (2d Cir. 1992). In that supervisor-harasser case, the Second Circuit followed agency principles and noted a plaintiff must demonstrate some specific basis to hold an employer liable for misconduct of its supervisory employees under a hostile environment theory. *Id.* at 62; *Karibian*, 14 F.3d at 779. Columbia University provided several reasonable avenues through its established procedures and policies, and did something about it. Under all court-established and

statutory guidelines, there is no specific basis whatever upon which to hold the University liable in this case. *See* Petition of Columbia University at 4, 5. Nonetheless, the Second Circuit cast aside agency principles and held contrary to its recent holding in *Kotcher*. Doing this required, as well, an abandonment of this Court's holding in *Meritor*, and is inconsistent with Title VII, Title IX and the guidelines of EEOC. Claims of sexual harassment are too complex to be subject to any absolute standard. Effective sexual harassment policies and procedures such as Columbia University's, which operate as a protective and proactive mechanism, are far too important to be cast aside in an irrelevant manner.

The Second Circuit has simply gone too far, in light of the existence of, nay, the requirement for, effective procedures and policies and their utilization under Title VII, and Title IX and the guidelines of EEOC. Such mechanisms are critical to empowering an alleged victim to obtain protective and remedial action. Where, as here, such policies and procedures are effective, they can clearly operate to divest the harasser-employee from such perceived authority, as in the instant case, and thereby empower the victim to reject the alleged harassment. *Meritor*, 477 U.S. at 72; *see also Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987).

Accordingly, we respectfully request this Court to grant the Petition of Columbia University in order to safeguard the important role of procedures and policies in effectuating the purposes of Title VII and Title IX. A case-by-case analysis is paramount to this end and consistent with the principles of agency analysis as set forth by this Court in *Meritor*. Unless this Court grants the

Petition of Columbia University, the effective mechanisms for dealing with sexual harassment developed and implemented by colleges and universities will be greatly undermined to the detriment of the very people the statutes and procedures are intended to protect.

Another problem with the Second Circuit's decision in this case presents itself when the holding is juxtaposed with New York's statutory pronouncement on employers intruding improperly into the area of private social relationships among employees. *Cf.* N.Y. Labor Law § 201-d (McKinney 1994). Faced with a standard of strict liability with regard to sexual harassment, employers might look to anti-fraternization policies, placing themselves in the untenable position of risking such intrusion and potentially inviting litigation based on violation of New York's Labor Law. *See* Petition of Columbia University at 15 n.9.

Further, the imposition of strict liability on employers for acts of sexual harassment by their employees could ensnare colleges and universities by restricting their traditional role in fostering a free marketplace of ideas for which American academia is the envy of the world. Nothing but a case-by-case analysis of procedures, policies and actions taken in cases of alleged sexual harassment can ensure against violations of free speech. Application of the Second Circuit's standard to even a portion of America's colleges and universities could operate to enforce and uphold the very restrictions on free speech in academia that have heretofore been rejected as violative of the Constitution and traditional academic principles. The principles of academic freedom and free speech must not be eviscerated by a hard and fast rule of strict liability as applied to sexual harassment.

Hence, application of the fair and rational principles enunciated in *Meritor* would accomplish the articulated goal of identifying and rejecting unacceptable, improper and unlawful conduct without intruding into the protections afforded all parties in cases of sexual harassment. Concomitantly, the protections now afforded privacy and free speech, which would be unavoidably mutated under the Second Circuit's rule, would be preserved.

CONCLUSION

Accordingly, sound public policy dictates that where, as here, the employer has: 1) investigated the harassment claim; 2) taken appropriate remedial steps, as warranted; 3) has effective grievance procedures and anti-discrimination policies in place; and 4) has effectively stopped the alleged harassment pursuant to those policies and procedures; these factors must be considered in determining whether the employer is liable, consistent with the import of Title VII, and Title IX, EEOC guidelines and the *Meritor* analysis. Were it not so, the rights and duties of all parties to these incidents would be indelibly diminished, undermined and abridged.

Therefore, consistent with its decision in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986), we respectfully urge this Court to grant the Petition of The Trustees of

Columbia University in The City of New York and John Borden and issue a Writ of Certiorari to the Court of Appeals for the Second Circuit.

Dated: Albany, New York
May 20, 1994

Respectfully submitted,

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APPENDIX

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Alfred University
American Academy of Dramatic Arts
American Academy McAllister Institute
Audrey Cohen College
Bank Street College of Education
Bard College
Barnard College
Boricua College
Bramson ORT Technical Institute
Canisius College
Catholic Medical Center School of Nursing
Cazenovia College
Clarkson University
Cochran School of Nursing
Colgate University
College of Aeronautics
College of Insurance
College of Mount Saint Vincent
College of New Rochelle
The College of Saint Rose
Columbia University
Concordia College
Cooper Union
Cornell University
Culinary Institute of America
D'Youville College
Daemen College
Dominican College of Blauvelt
Dowling College
Elmira College
Fordham University
Hamilton College
Hartwick College
Helene Fuld School of Nursing
Hilbert College
Hobart & William Smith Colleges
Hofstra University
Houghton College
Institute of Design and Construction
Interfaith Medical Center School of Nursing
Iona College
Ithaca College
Jewish Theological Seminary of America
Keuka College
The King's College
Le Moyne College
Long Island College Hospital School of Nursing
Long Island University
Manhattan College
Manhattan School of Music
Manhattanville College

Maria College of Albany
Marist College
Marymount College
Marymount Manhattan College
Mater Dei College
Medaille College
Mercy College
Molloy College
Mount Saint Mary College
Nazareth College
New School for Social Research
New York Chiropractic College
New York College of Podiatric Medicine
New York Institute of Technology
New York Medical College
New York School of Interior Design
New York University
Niagara University
Nyack College
Pace University
Paul Smith's College
Phillips Beth Israel School of Nursing
Polytechnic University
Pratt Institute
Rensselaer Polytechnic Institute
Roberts Wesleyan College
Rochester Institute of Technology
Rockefeller University
The Sage Colleges
St. Bonaventure University
St. Elizabeth Hospital School of Nursing
St. Francis College
St. John Fisher College
St. John's University
St. Joseph's College
St. Joseph's Health Center School of Nursing
St. Lawrence University
St. Thomas Aquinas College
Sarah Lawrence College
Siena College
Sisters Hospital School of Nursing
Skidmore College
Syracuse University
Teachers College of Columbia University
Touro College
Trocaire College
Union College
University of Rochester
Utica College of Syracuse University
Vassar College
Villa Maria College of Buffalo
Wadhams Hall Seminary-College
Wagner College
Webb Institute of Naval Architecture
Wells College
Yeshiva University

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MAY 23 1994

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") and the National Association of Manufacturers ("the NAM") respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of the Petitioners in this case. The written consents of Petitioners Columbia University and John Borden, and Respondent Mark Urban, have been filed

with the Clerk of the Court. Respondent Sharon Karibian has refused consent.

In support of this motion, EEAC and the NAM by the following show that this brief brings relevant matters to the attention of the Court that have not already been brought to its attention by the parties.

1. EEAC is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. The NAM is a voluntary business association of over 12,500 companies and subsidiaries, employing eighty-five percent of all manufacturing workers, and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council. The NAM and these councils are vitally interested in preventing sexual harassment in the workplace.

3. All of EEAC's and the NAM's members, and the constituents of their association members, are subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII), as well as

other equal employment statutes and regulations. As employers, EEAC's and the NAM's members and member constituencies have a strong interest in maintaining workplaces that are free from sexual harassment. EEAC's and the NAM's members have followed this Court's guidance in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), for eliminating and combating sexual harassment by adopting policies expressly forbidding supervisors and employees from engaging in sexually harassing conduct; by publicizing in employee manuals and notices an employee's right to be free from sexual harassment in the workplace; and by training supervisors and employees to recognize and halt harassment in the workplace. In addition, many members have implemented formal anti-harassment procedures that allow an aggrieved employee to seek redress from higher management authorities, or even bring an internal complaint against a supervisor or co-worker who has engaged in harassment in the workplace. These policies call for prompt and effective remedial action by the employer, including discipline and, where appropriate, discharge of the offender.

4. Thus, the issues presented in the petition are extremely important to the nationwide constituency that EEAC and the NAM represent. The court below held that an employer will be strictly liable for a supervisor's sexual harassment, despite an employer's strong policies against sexual harassment and reasonable complaint procedures for resolving sexual harassment claims. By adopting an absolute standard for sexual harassment, the Second Circuit is in direct conflict with this Court's decision in *Meritor*, which said that employers are not always automatically liable for sexual harassment by their supervisors.

Further, the decision below conflicts with those of other circuits which consider an employer's express policy against sexual harassment and its procedures for resolving sexual harassment complaints when determining employer liability.

5. Because of its interest in the nation's civil rights laws, EEAC has, since its founding in 1976, filed briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC participated as *amicus curiae* in *Meritor* as well as the recently decided *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993). In addition, EEAC has filed briefs in a number of other cases involving sexual harassment issues. *See, e.g., Chrysler Corp. v. International Union, Allied Indus. Workers of Am., AFL-CIO, cert. denied*, 113 S. Ct. 304 (1992) (petition seeking review of lower court decision upholding arbitration award reinstating an employee terminated for sexual harassment); *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir.), *cert. denied*, 113 S. Ct. 660 (1992) (overturning arbitration award reinstating employee terminated for sexual harassment); *Stockstill v. Shell Oil Co.*, 3 F.3d 868 (5th Cir. 1993) (defamation suit based on employer's response to government investigator's inquiry); *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59 (2d Cir. 1992) (addressing the effect of an employer's prompt and effective response to a complaint of sexual harassment); and *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466 (11th Cir. 1991) (age discrimination claim by employee terminated for sexual harassment).

6. Because of their significant experience, EEAC and the NAM are uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally, as opposed to its significance to the immediate parties.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council and the National Association of Manufacturers respectfully request the Court to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1674

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and JOHN BORDEN,
Petitioners,

v.

SHARON KARIBIAN and MARK URBAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council ("EEAC") and the National Association of Manufacturers ("the NAM") respectfully submit this brief *amici curiae* contingent upon the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari filed in this case by Columbia University and John Borden, and urges reversal of the decision below.

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici curiae* is fully set forth in the accompanying motion.

STATEMENT OF THE CASE

In 1987, Respondent Sharon Karibian was a part-time student at Columbia University's School of General Studies. Pet. App. A4.[1] She also was a part-time clerical worker for the University's fund-raising operation, the Telefund at Columbia ("Telefund"). *Id.* The Telefund operated under the aegis of Columbia University's Office of University Development and Alumni Relations ("UDAR"), but was designed and administered by an outside consultant, Philanthropy Management, Inc. ("PMI"). *Id.* During her tenure with the Telefund, Karibian was steadily promoted, eventually securing the highest position at the Telefund as Project Director. Pet. App. A5.

Karibian met Respondent Mark Urban in the spring of 1987, before Urban began working for Columbia. Pet. App. A18. She alleges that Urban pressured her into having sexual relations beginning shortly after they met and continuing through 1989. *Id.* In September 1987, Columbia appointed Urban to a position at UDAR, Pet. App. A4, but he did not become Karibian's direct supervisor until the fall of 1989 when Karibian became Project Director of the Telefund. Pet. App. A5.

Columbia has a set procedure for dealing with sexual harassment, set forth in a bulletin entitled "Protection Against Sexual Harassment." Pet. App. A18. It begins with an unambiguous declaration that "the

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[1] Citations to the Appendix to the Petition for a Writ of Certiorari are designated as Pet. App. ——. The opinion of the Court of Appeals for the Second Circuit below, reported at 14 F.3d 773, is reproduced at Pet. App. A1-A16. The opinion of the district court, reported at 812 F. Supp. 413, is reproduced at Pet. App. A17-A24.

University prohibits sexual harassment of any member of the Columbia community." Pet. App. A18. It then outlines three available avenues of redress for employees who feel they are experiencing sexual harassment: a conference with a member of the University Panel on Sexual Harassment; a discussion with the University's Office of Equal Opportunity and Affirmative Action ("EOAA"); and the university's formal grievance procedure. Pet. App. A18-19. An individual may select the procedure best suited to his or her needs. Pet. App. A19. The grievance procedure generates an investigation that may lead to remedial action. Pet. App. A19.

In September 1988, Karibian consulted both with a Panel member and an EOAA coordinator. Pet. App. A5. Both of these meetings were kept confidential at Karibian's request. *Id.*

It was not until January 30, 1990 that Karibian went to the Director of Development Services at UDAR and complained that Urban was undermining her in her job as Project Director of Telefund since her sexual relationship with Urban had ended. Pet. App. A6. At the same time, she met again with the EOAA coordinator, this time abandoning her confidentiality request. Pet. App. A6. Columbia then began an investigation, promptly removed Karibian from Urban's supervision, and asked Urban to resign. Pet. App. A23.

Karibian sued Columbia, Urban, and Urban's superior, claiming that Urban's actions constituted sexual harassment in violation of Title VII. The district court, applying this Court's decision in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), granted

summary judgment for the defendants. Pet. App. A23. The court concluded that Karibian, who had suffered no economic harm, had no valid claim under a *quid pro quo* theory. Pet. App. A21. Since Columbia had provided a "reasonable avenue for making complaints," *id.*, and had taken "prompt and effective remedial action" as soon as "plaintiff made a complaint of such a nature as to require action," Pet. App. A23, the district court likewise found no triable issue of fact on Karibian's hostile environment claim. *Id.*

The Second Circuit reversed on both grounds. First, the Second Circuit concluded that the *quid pro quo* theory requires no showing of actual economic loss where the employee submits to the supervisor's advances, Pet. App. A10-11. Second, the court concluded that Columbia also was liable to Karibian on a hostile environment theory because it was liable under a *quid pro quo* theory, "regardless of the absence of notice or the reasonableness of Columbia's complaint procedures." Pet. App. A14. Columbia has petitioned this Court for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision of the Second Circuit below, in effect, holds an employer strictly liable for a supervisor's acts of sexual harassment. This holding conflicts directly with this Court's decision in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), where this Court stated, "[W]e hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.* at 73.

The court below also failed to follow *Meritor's* direction to apply common law agency principles when assessing an employer's liability for sexual harassment. Under these principles, an employer with a strong policy against sexual harassment coupled with an effective grievance procedure cannot be said to have conferred "apparent authority" on a supervisor to engage in sexual harassment.

In addition, the decision below conflicts with those of several other circuit courts which hold that an employer does not incur liability for a hostile work environment created by a supervisor unless it knew or should have known of the misconduct and failed to take effective appropriate action. Where an employer has adopted a strong company policy prohibiting workplace sexual harassment and has established an adequate procedure for addressing complaints, the employer cannot be liable for a supervisor's or employee's creation of a hostile environment of which the employer had no actual or constructive knowledge if the alleged victim failed to take advantage of that procedure, or if the employer took prompt and effective action.

Moreover, agency principles and important policy concerns dictate that employers should not be held strictly liable for sexual harassment by a supervisor. As a practical matter, a large employer with a strong anti-harassment policy and accessible procedure cannot be deemed to have authorized a manager to engage in sexual harassment. A strict liability approach may encourage some employers to weaken their sexual harassment complaint procedures rather than generate claims that, if substantiated, could lead to only one conclusion—employer liability.

The decision below has undermined the enforcement of Title VII and caused uncertainty for employers seeking to fulfill their obligation to eliminate workplace sexual harassment, and should be reversed by this Court.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING THAT AN EMPLOYER IS STRICTLY LIABLE FOR A SUPERVISOR'S SEXUAL HARASSMENT REGARDLESS OF THE EFFECTIVENESS OF THE EMPLOYER'S COMPLAINT PROCEDURES OR THE ABSENCE OF NOTICE TO THE EMPLOYER OF THE ALLEGED CONDUCT IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *MERITOR SAVINGS BANK v. VINSON*

A. This Court Held in *Meritor* That Title VII Does Not Make Employers Strictly Liable for Sexual Harassment, But Requires Instead That Courts Apply Common Law Agency Principles

This Court has ruled that Title VII does not render employers automatically liable for sexual harassment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). In *Meritor*, both parties sought to have the Court establish a standard for employer liability. While this Court declined to issue a definitive rule, it clearly rejected a strict liability standard, holding that "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.*

Instead, this Court stated:

> [C]ongress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any

> "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. See generally Restatement (Second) of Agency §§ 219-237 (1958).

Id. The Court encouraged employers to adopt effective anti-harassment policies including, at a minimum, (1) a specific prohibition against sexual harassment and (2) a procedure that is "calculated to encourage victims of harassment to come forward," including more than one avenue of complaint. *Id.* at 72-73.

B. Under Common Law Agency Principles, a Supervisor Lacks "Apparent Authority" To Commit Sexual Harassment Where The Employer Has A Strong Policy Against Sexual Harassment and an Effective Complaint Procedure

Common law agency principles establish that "[a] master is subject to liability for the torts of his servants committed *while acting in the scope of their employment.*" *Restatement (Second) of Agency* § 219(1) (1958) (emphasis added). Conversely,

> A master is *not* subject to liability for the torts of his servants acting *outside* the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal *and* there was reliance upon apparent authority, or he

> was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency § 219(2) (1958) (emphasis added).

A supervisor generally is acting within the scope of employment when he or she hires, fires, disciplines, promotes, or regulates the working conditions of the employees he or she is supervising.[2] The scope of employment, however, does not include carrying out those activities in a manner expressly forbidden by the employer.[3] In Policy Guidance issued by the Equal Employment Opportunity Commission, the federal agency having enforcement authority over Title VII, the agency noted that "[i]t will rarely be

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[2] The Restatement defines "scope of employment" as follows:

> Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limts;
>
> (c) it is actuated, at least in part, by a purpose to serve the master, and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Restatement (Second) of Agency, § 228(1).

[3] *Restatement (Second) of Agency,* § 230, comment c. (1958) states in pertinent part:

> Prohibition to do any acts except those of a certain class may indicate that the scope of employment extends only to acts of that class. Furthermore, the prohibition by the employer may be a factor in determining whether or not, in an otherwise doubtful case, the act of the employee is incidental to the employment; it accentuates the limits of the servant's permissible action and hence makes it more easy to find that the prohibited act is entirely beyond the scope of employment.

the case that an employer will have authorized a supervisor to engage in sexual harassment." *Policy Guidance on Current Issues of Sexual Harassment*, No. N-915-050, at 25, March 19, 1990 ("EEOC Policy Guidance"). Thus, sexual harassment can hardly be considered within the scope of employment.[4]

Nevertheless, liability for a supervisor's sexual harassment still could be imputed to the employer if the employer gave the supervisor "apparent authority" to do so.[5] As the EEOC's Policy Guidance explains:

> [*I*]*n the absence* of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management.

EEOC Policy Guidance at 25 (emphasis added). But, the Commission continues:

> [A]n employer can divest its supervisors of this apparent authority by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure. When employees know that recourse is available, they cannot reasonably believe that a harassing work en-

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[4] Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Restatement (Second) of Agency, § 228(2).

[5] *Restatement (Second) of Agency*, § 219(2)(d), *supra* pp. 7-8.

> vironment is authorized or condoned by the employer.

Id. at 26.[6]

Meritor, by following agency principles, established the foundation for applying this principle to sexual harassment cases. The Court in *Meritor* considered both the existence of the employer's policy and the effectiveness of its grievance procedure, and found them wanting. Meritor Bank's policy did not specifically address sexual harassment, and the procedure would have required the victim to complain to the alleged harasser. Thus, the Court rejected the employer's contention that its policy and procedure, coupled with the victim's failure to invoke the procedure, shielded the employer from liability. The Court noted, however, that "Petitioner's contention

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[6] The Policy Guidance expressly limits this interpretation to "hostile environment" cases. EEOC Policy Guidance at 26 n.36. The EEOC and some courts have presumed, as did the decision below, that an employer is absolutely liable for a supervisor's *quid pro quo* harassment. *Id.* at 21.

In adopting such an absolute liability approach, the EEOC suggests that this Court in *Meritor* tacitly approved such a position. EEOC Policy Guidance at 21. As noted above, however, this Court in *Meritor* declined to create a definitive rule on employer liability, but directed courts to apply agency principles when assessing employer liability. *Meritor*, 477 U.S. at 72. Since *Meritor* was a hostile work environment case, this Court did not address employer liability for a *quid pro quo* case and did not state that the liability standards for hostile work environment and *quid pro quo* cases should be different.

On the contrary, application of traditional agency principles to *quid pro quo* situations compels the conclusion that an employer is not automatically liable for its supervisor's acts of *quid pro quo* sexual harassment. Rather, an employer would be held liable for a supervisor's *quid pro quo* demands if and only if agency principles so required.

that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." *Meritor*, 477 U.S. at 73.

This language suggests that an employer can avoid liability where it has such a policy and procedures because it makes it clear to employees that a supervisor does not have "apparent authority" to discriminate. At the very least, it mandates consideration of the existence and effectiveness of an employer's policy and procedures before imposing liability.

Accordingly, regardless of whether harassing behavior is characterized as "*quid pro quo*" or "hostile environment" sexual harassment,[7] common law ag-

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[7] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, prohibits, *inter alia*, sex discrimination in the workplace. 42 U.S.C. § 2000e-2(a)(1). Sexual harassment is included in the Title VII prohibition. *Meritor*, 477 U.S. 57, 64 (1986).

The Equal Employment Opportunity Commission promulgated Guidelines in 1980 applying Title VII to sexual harassment in the workplace. 29 C.F.R. § 1604.11. The Guidelines recognized two specific types of harassment as unlawful under Title VII: hostile environment and *quid pro quo*.

According to the EEOC Guidelines, hostile environment sexual harassment occurs when

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a)(1) and (3), quoted with approval in *Meritor*, 477 U.S. at 65. *Quid pro quo* sexual harassment occurs when "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for

ency principles dictate that an employer's policy and procedures be examined to determine whether the supervisor in question indeed had "apparent authority" to do the acts alleged, and that the employer be shielded from liability where the supervisor did not. Where the employer, as this Court and the EEOC have suggested; (1) has a policy prohibiting sexual harassment in the workplace; and (2) has in place an effective mechanism that encourages employees to report harassing behavior and provides for a prompt investigation and effective response to such claims, it cannot be said that the employer condoned such behavior. EEOC Policy Guidance at 26.

To hold employers who have strong policies and effective procedures in place liable for sexual harassment in effect imposes liability without fault. Where an employer has a well-publicized policy forbidding sexual harassment and an accessible complaint procedure offering relief, a victim of sexual harassment cannot reasonably argue that the perpetrator had "apparent authority" to engage in such conduct. In such a case, the victim need only activate the employer's complaint procedure to seek corrective action.

C. The Decision Below In Effect Held The Employer Strictly Liable For Sexual Harassment By A Supervisor, And Thus Conflicts With The Requirements Of *Meritor*

While the Second Circuit below said it was applying agency principles, it actually held the employer strictly liable for a supervisor's acts of sexual harassment. The court below first held Columbia strictly liable on a *quid pro quo* theory, stating "because the

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employment decisions affecting such individual. . . ." 29 C.F.R. § 1604.11(a)(2).

quid pro quo harasser, by definition, wields the employer's authority to alter the terms and conditions of employment—either actually or apparently—the law imposes strict liability on the employer for *quid pro quo* harassment." Pet. App. A9. The court then effectively concluded that where a supervisor is involved and *quid pro quo* is found, the employer also is automatically liable where the circumstances constitute a hostile environment *regardless of whether the employer had an effective complaint procedure*:

> [w]e agree with Karibian that Columbia would be liable for Urban's alleged harassment *regardless of the absence of notice or the reasonableness of Columbia's complaint procedures.*
>
> * * * *
>
> Our conclusion that Columbia would be liable on a hostile environment claim for the harassment alleged by Karibian follows naturally from our earlier conclusion that Karibian stated a valid claim for *quid pro quo* harassment. . . . It would be a jarring anomaly to hold that conduct which always renders an employer liable under a *quid pro quo* theory does not result in liability to the employer when that same conduct becomes so severe and pervasive as to create a discriminatorily abusive work environment.

Pet. App. A14-15 (emphasis added) (citations omitted).

Thus, while the Second Circuit paid lip service to agency principles, it misapplied them to adopt a rule of strict liability whenever a supervisor is involved in sexual harassment. Accordingly, the decision below conflicts with this Court's decision in *Meritor*.

II. THE DECISION BELOW ALSO CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS THAT HAVE HELD THAT AN EMPLOYER IS NOT LIABLE FOR A SEXUALLY HOSTILE WORKING ENVIRONMENT WHERE THE EMPLOYER HAS AN EXPRESS POLICY AGAINST SEXUAL HARASSMENT AND HAS ADEQUATE PROCEDURES FOR INVESTIGATING AND RESOLVING SEXUAL HARASSMENT CLAIMS

The Second Circuit's disregard for an employer's express policy against sexual harassment and its grievance procedure for resolving claims is in direct conflict with several other circuits, which have ruled that an employer is not liable for hostile environment sexual harassment unless it knew or should have known of the situation and failed to take prompt and appropriate remedial action.

The Seventh Circuit in *Saxton v. AT&T*, 10 F.3d 526 (7th Cir. 1993), while concluding that the complained-of behavior was insufficient to constitute a hostile working environment, held that "Saxton's claim must fail in any event, because she has not demonstrated that AT&T failed to take prompt and appropriate remedial action upon discovering the harassment." *Id.* at 535. In *Saxton*, AT&T officials began an investigation the day they received Saxton's complaint, completed a detailed report within two weeks, and within five weeks transferred the accused harasser to another department. *Id.* These actions, the Seventh Circuit concluded, were "steps reasonably likely to stop the harassment" sufficient to relieve the employer of liability. *Id.* at 536.

Likewise, in *Carmon v. Lubrizol Corp.*, 17 F.3d 791 (5th Cir. 1994), the Fifth Circuit refused to hold an employer liable for sexual harassment because:

> Lubrizol twice did what a company *ought* to do when faced with allegations that an employee has been subjected to sexual harassment, engendering a hostile work environment: It took the allegations seriously, it conducted prompt and through investigations, and it immediately implemented remedial and disciplinary measures based on the results of such investigations. Holding a company such as Lubrizol liable after it has taken such action would produce truly perverse incentives benefitting no one, least of all actual or potential victims of sexual harassment.

Id. at 795-796. (emphasis in the original).

In a similar case, *Nash v. Electrospace System, Inc.*, 9 F.3d 401 (5th Cir. 1993), the Fifth Circuit also absolved an employer from liability for hostile environment harassment by her line supervisor, stating:

> While *Harris* proclaims that sexually hostile or abusive work environments are no longer to be tolerated under Title VII, that fact does not transform Title VII into a strict liability statute for employers. An employer is liable only if it knew or should have known of the employee's offensive conduct and did not take steps to repudiate that conduct and eliminate the hostile environment.

Id. at 404 (referring to this Court's decision in *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993)). The court observed that the company had a written policy against sexual harassment that had been in effect for a number of years. *Id.* at 404. Further, the company had a formal grievance procedure that the court said "[s]hould be counted strongly in [the company's] favor here because Nash—per her

deposition testimony—knew Sharp had no authority to terminate her." *Id.* at 404 n.2.

Other circuits also have refused to hold employers strictly liable for hostile working environments where the employer had a strong policy against sexual harassment and an adequate procedure for resolving claims.[8]

Thus, the Second Circuit is out of step with other circuits that do not hold employers strictly liable for sexual harassment where they have taken appropriate measures to prohibit sexual harassment in the workplace. This conflict must be resolved by granting the petition for writ of certiorari in this case.

III. IF ALLOWED TO STAND, THE SECOND CIRCUIT'S HOLDING THAT EMPLOYERS ARE STRICTLY LIABLE FOR SUPERVISORS' ACTS OF SEXUAL HARASSMENT WILL HAVE SERIOUS ADVERSE POLICY CONSEQUENCES

A. Employers Have Instituted Strong Policies Against Sexual Harassment Based On This Court's Guidance In *Meritor*

Based on this Court's *Meritor* decision, employers such as EEAC's and the NAM's member companies have established clear and unequivocal policies forbidding sexual harassment in the workplace, and have

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[8] *See, e.g., Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987) (employer not liable for "hostile environment" sexual harassment under Title VII when it took immediate action, including investigation and discipline, upon receipt of complaint); *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178 (6th Cir.), *cert. denied*, 113 S. Ct. 831 (1992) (rejects strict liability for hostile environment cases); and *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) ("strict liability is illogical in a pure hostile environment setting").

instituted procedures for prompt and appropriate handling of complaints. These employers have put into practice the EEOC's strong recommendation that:

> [a]n effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. *See Vinson*, 106 S. Ct. at 2408. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

EEOC Policy Guidance at 29. Indeed, some companies go so far to require employees who observe sexual harassment to report it. They make failure to report the activity a ground for discipline, even if the employee was just an observer, and not a participant in the conduct.

B. Failure To Insulate Employers With Strong Policies Against Sexual Harassment Will Be Counterproductive To The Goal Of Eradicating Sexual Harassment In The Workplace

When a defendant employer has in place a strong policy forbidding sexual harassment and an effective complaint procedure, allowing a Title VII recovery to a plaintiff who has failed to report harassing con-

duct is tantamount to strict liability. Any standard imputing liability to the employer merely because the perpetrator had supervisory authority over the individual ignores the realities of today's workplace and the size of the nation's largest employers. A company with thousands of employees necessarily has many layers of management responsibility, from the CEO down to first-line managers, with many increments of authority in between. It is unreasonable to suggest that merely because some supervisory responsibilities have been delegated to a manager, the company is strictly liable when that manager engages in conduct that has been expressly prohibited by the company.

As a practical matter, where the affected employee does not make use of an anti-harassment policy, a large employer may have no way of knowing that harassing behavior is occurring, assuming that there is no visible offensive conduct that would create constructive knowledge. Lacking such actual knowledge or any reason to know that unlawful conduct is occurring, the employer is unable to take steps to protect the victim from actions contrary to company policy. Thus, an employer that has taken such precautions cannot be responsible under any theory if it does not know or have reason to know of the conduct and thus has no opportunity to take appropriate action.

As the EEOC's guidance suggests, a good procedure encourages employees to report incidents of harassment, and includes methods to bypass the direct supervisor if that person also is the harasser. A plaintiff's unexcused failure to make use of an available recourse that could have remedied the situation must negate employer liability. Even the most conscientious, enlightened employer cannot control every

day-to-day action of every employee in each remote location. An employer must know of harassing behavior before it can take action to halt it. Holding such an employer liable for the actions of a supervisor that violates an express company policy when the employer did not know, and did not have reason to know of the offensive conduct, unfairly makes that employer a "deep pocket" liable for a situation over which it had no control.

Finally, prompt and effective action by an employer who *is* informed of harassing behavior likewise should obviate liability. An employer who can show that, upon learning that harassment has occurred, it conducted a thorough and *bona fide* investigation, reached a rational conclusion and took appropriate action, should be credited for those efforts.

If the Second Circuit's holding of strict liability for sexual harassment is allowed to stand, some employers may decide that a highly publicized policy against sexual harassment and an aggressive investigation of those allegations will only work against their interests. With strict liability as the rule, it is likely that some employers will view complaint procedures as merely encouraging claims for which they then prove themselves liable if they uncover sexual harassment. These employers may elect to soft-pedal previously strong policies against harassment, deciding that while they can handle the few cases that may arise on their own, there is no point in providing encouragement.

This result would undermine years of progress toward the elimination of sexual harassment in the workplace. While many employers undoubtedly will retain their strong policies because it is the "right thing to do," even they may have some trepidation

about conducting a thorough investigation, since doing so will only confirm their liability under a strict liability standard.

CONCLUSION

For the foregoing reasons, EEAC and the NAM respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 93-1674

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and JOHN BORDEN,

Petitioners,

vs.

SHARON KARIBIAN and MARK URBAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF BROWN UNIVERSITY, JOHNS HOPKINS UNIVERSITY, THE NEW SCHOOL FOR SOCIAL RESEARCH, NEW YORK UNIVERSITY, PACE UNIVERSITY, PRESIDENTS COUNCIL, STATE UNIVERSITIES OF MICHIGAN, THE TRUSTEES OF PRINCETON UNIVERSITY, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, STANFORD UNIVERSITY, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, THE UNIVERSITY OF ILLINOIS AND YESHIVA UNIVERSITY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Equal Employment Opportunity Commission: *Proposed Guidelines on Harassment Based Upon Race, Color, Religion, Gender, National Origin or Disability*, 58 Fed. Reg. 51266 (Oct. 1, 1993) 4

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"A Sexual Harassment Case to Test Academic Freedom," *The New York Times*, May 11, 1994, p. D23, col. 1 10

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American Council on Education, *Sexual Harassment on Campus: A Policy and Program of Deterrence* (1992) 5

American Association of University Professors, "Sexual Harassment: Suggested Policy and Procedures for Handling Complaints," *Policy Documents & Reports* (1990 ed.) at 113-115 ... 5

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Amici curiae, as above named, respectfully support the petition of petitioner, the Trustees of Columbia University in The City of New York ("Columbia University"), for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the decision and judgment dated January 25, 1994 in *Karibian v. Columbia University, et al.*, No. 93-7188, reported at 14 F.3d 773. The original consents of counsel for all parties to the filing of this brief are being filed concurrently herewith pursuant to Supreme Court Rule 37.2.

INTEREST OF AMICI

Both before and after this Court's decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), *amici* and other institutions of higher learning throughout the country have developed policies prohibiting sexual harassment. They have also initiated training to prevent and created mechanisms for faculty, employees and students to report (and for the institutions to investigate and remedy) prohibited conduct. The Court's language in *Meritor* and the ensuing advice of the EEOC further encouraged such institutions to believe that training and internal enforcement would advance the salutary purposes of Title VII[1] and, similarly, of Title IX.[2] These policies and procedures engage the victims of alleged harassment and the institutions in a cooperative problem-solving process: the complainant is encouraged and empowered to report harassment, and the institution undertakes an obligation to protect the victim and to take action, so that complaints are promptly addressed and effectively resolved.

By splitting with other Circuits in construing *Meritor*, the Second Circuit's decision will, unless modified, undermine this cooperative process and the goals it seeks to achieve. The court below has held that the existence — and, indeed, the effective operation — of mechanisms to investigate and redress harassment are irrelevant in determining whether an institution will be civilly liable for an employee's misconduct under a "hostile environment" theory. Under the Second Circuit's *respondeat superior* standard, an employer automatically "*is* liable" if a supervisor engages in sexual harassment, regardless of the institution's policy or efforts to create and preserve a hospitable environment. 14 F.3d at 780 (emphasis supplied). The Second Circuit's approach is antithetical to the remedial and educational purposes of Title VII and Title IX, is contrary to *Meritor*, and may actually discourage the development and use of effective self-regulating mechanisms in the academic tradition.

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[1] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sections 2000e, *et seq.*

[2] Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681.

The interest of *amici* — a group of 23 American colleges and universities[3] — is not to limit the reach of Title VII, but to foster an environment in which prevention, prompt intervention and internal remediation are encouraged. *Amici* believe that a standard of liability should be reaffirmed which recognizes and takes account of institutional policies and effective actions designed to achieve the statutory goals. This objective was clearly endorsed by this Court in *Meritor*, and has been followed by the other Circuits which have considered it. However, it is substantially undercut by the decision below.

ARGUMENT

In *Meritor*, this Court confronted the difficult issues presented where a supervisor engages in proscribed conduct, but where the employer itself neither knows of nor condones the supervisor's actions. While declining "to issue a definitive rule on employer liability," 477 U.S. at 72, the Court suggested a flexible framework for such analysis: on the one hand, it found "that Congress wanted courts to look to agency principles in this area"; on the other, it found that Title VII also "evinces an intent to place some limits on the acts of employees for which employers . . . are to be found liable." *Ibid.* In searching for a reasoned standard, the Court explicitly rejected absolute employer liability. Thus, while *Meritor* cautions that, "the mere existence of a grievance procedure and a policy against discrimination, coupled with [the employee's] failure to invoke that procedure," will not necessarily "insulate [an employer] from liability," *id.* at 73, it also expressly finds that Title VII does *not* "impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case." *Ibid.*

Meritor does not spell out all the factors for courts to consider in "hostile environment" cases, but does identify as relevant the specific content of the employer's policy on prohibited conduct, as well as the efficacy of the employer's complaint resolution procedures. *Id.* at 72-73.

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[3] *Amici* include 11 individual colleges and universities and the Presidents Council, State Universities of Michigan, which consists of 12 public colleges and universities in that State.

The lessons of *Meritor* were not lost on either the EEOC or the higher education community. The EEOC has promulgated guidelines which explicitly encourage employers to:

> "take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their rights to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned."

Guidelines on Discrimination Because of Sex, 29 C.F.R. Section 1604.11(f). Consistent with these guidelines, the EEOC stressed the significance of an employer's policies and procedures in assessing employee complaints:

> "An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer . . . should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to 'encourage victims of harassment to come forward' . . . ."

EEOC: *Policy Guidance on Current Sexual Harassment Issues*, 8 Fair Empl. Pract. Manual (BNA) 405:6681 (March 19, 1990). Indeed, the EEOC has instructed its field personnel that when an employer has taken prompt, appropriate and effective remedial action, the Commission "normally will administratively close the charge." *Id.*, Section E(2).[4]

Colleges and universities (which are bound by Title IX as well as by Title VII) have taken the lead in developing policies and

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[4] In late 1993, the EEOC reiterated its adherence to the *Meritor* standard when it issued proposed guidelines with respect to harassment based upon race, color, religion, gender, national origin and disability. The Commision proposes to apply "the same standard of liability for harassment by supervisors" as for sexual harassment cases. 58 Fed. Reg. 51266, 51268 (October 1, 1993).

procedures to deal with sexual harassment.[5] Such policies and procedures do more than recite abstract prohibitions; they are designed to make members of the community aware of the kinds of actions which may be unwelcome to others, and to furnish a range of assistance and remedies to community members who may have been victimized by harassment. Like Columbia University, *amici* believe that the existence of these procedures not only sensitizes and educates the university community, but also demonstrates the university's commitment to fair treatment of all its members.

However, even if an employer has taken affirmative steps to prevent its employees from engaging in sexual harassment, and has established mechanisms to mitigate or redress improper behavior, the possibility always remains that an individual employee in a supervisory position will act in a manner inconsistent with expressed institutional values. In such cases, it does not serve the statutory goals to permit the lower courts to ignore the institution's policy and impose *per se* liability for repugnant individual conduct. On the contrary, such a standard would eviscerate *Meritor*, and would reduce the incentives for victims of hostile environments to seek cooperative solutions rather than to litigate. *Amici* do not suggest that the mere existence of nicely-drafted policies and procedures should be an absolute defense

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[5] Hundreds of institutions across the country have promulgated such policies. *See Sexual Harassment on Campus: A Legal Compendium*, National Association of College and University Attorneys (1988). Both the American Council on Education ("ACE") and the American Association of University Professors ("AAUP") have also been active in disseminating proposed policies and procedures to deter and deal with sexual harassment, specifically relying upon *Meritor* in framing their suggestions. The ACE and AAUP policy documents both stress that policies and procedures should educate members of the academic community to expected standards of conduct, and should encourage victims to come forward at an early stage so that problems may be solved. *See*, American Council on Education, *Sexual Harassment on Campus: a Policy and Program of Deterrence* (1992) at 1-4; American Association of University Professors, "Sexual Harassment: Suggested Policy and Procedures for Handling Complaints," *Policy Documents & Reports* (1990 ed.) at 113-115.

to liability. Where misconduct is known to and tolerated by an employer, paperwork alone will not cure the problem. But for institutions with diffuse, largely "horizontal" management structures — like colleges and universities — to be held absolutely liable for the unilateral acts of *any* supervisor who succeeds in ignoring an effective policy is not only unfair, but discourages institutional interest in pursuing and making a record of wrongdoing.[6] Such, however, is precisely the risk created by the inflexible standard adopted below.

Both the First and Sixth Circuits, along with others,[7] have adopted a "rule of reason" approach consistent with *Meritor*, the EEOC guidelines, and common sense.

In *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), it was alleged that medical school faculty members/administrators had engaged in highly offensive conduct towards the plaintiff subordinate which created a "hostile environment." Faced with the question whether the institution should be held vicariously liable for the misconduct, the First Circuit relied on *Meritor* to reject a rule of absolute liability:

> "The gist of the Court's holding is not to be gleaned from strict adherence to agency principles, which, as the Court noted, were to be mere 'guidance,' *Meritor*, 477 U.S. at 72, n21, but rather from its definitive refusal to find employers 'always automatically liable.' *Id.* We take this statement to mean exactly what it says: that employers are not always automatically liable.
>
> * * *
>
> "We therefore hold, following *Meritor*, that in a Title IX case, an educational institution is liable upon

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[6] Indeed, the fear of "creating a record" which could be used against them in subsequent litigation notwithstanding their own efforts to redress grievances could substantially undermine institutional commitment to respond aggressively to harassment claims.

[7] The rulings of other Circuits which have followed *Meritor* are discussed in the Petition for a Writ of Certiorari at pp. 10-11.

> a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees *if an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it.*"

864 F.2d at 900-901; emphasis supplied.[8]

The Sixth Circuit very recently applied a similar "rule of reason" standard in *Reed v. Delta Airlines, Inc.*, ____ F.3d ____, 1994 U.S. App. LEXIS 3485 (6th Cir. Docket No. 93-5031, filed February 24, 1994, as amended April 13, 1994).[9] Despite serious and ongoing misconduct by a supervisor, the Circuit Court held that there was no basis for employer liability under *Meritor* where prompt and effective remedial action had been taken by the employer:

> "[T]he Supreme Court declined to prescribe a definitive rule on employer liability for harassment at the hands of supervisors. * * * Under established agency principles, the Court noted, absence of notice does not necessarily insulate the employer from liability; by the same token, however, there is no invariable rule of absolute liability for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known of the misconduct. The existence of a grievance procedure and a failure to invoke it are not necessarily dispositive, finally, although facts such as these are 'plainly relevant.' "

1994 U.S. App. LEXIS 3485, at *10-*13.

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[8] Although the *Lipsett* claim was brought under Title IX, the sexual harassment analysis is explicitly derived from Title VII case law. *Id.* at 896.

[9] The *Reed* decision was not recommended for full-text publication by the Sixth Circuit. While Sixth Circuit Rule 24(c) states that citation of unpublished decisions is "disfavored," the rule creates an exception where "counsel believes . . . that an unpublished decision has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well." We respectfully submit that the Rule 24(c) exception applies here.

By sharp contrast with the standards adopted by the other Circuits, the Second Circuit's decision below states that on a hostile environment claim against a supervisor, "the employer's liability is absolute." 14 F.3d at 780. In short, the decision below creates insurer's liability. Thus, despite Columbia's clear prohibition of sexual harassment, its procedures for redress of grievances, its lack of actual or imputed knowledge, and the actual steps which it took to protect Karibian and to remove the offending supervisor, the Second Circuit found that Columbia would have no defense to liability:

> "Applying these principles, we agree with Karibian that *Columbia would be liable for Urban's alleged harassment regardless of the absence of notice or the reasonableness of Columbia's complaint procedures.*"

14 F.3d at 780 (emphasis supplied).

The Second Circuit's *per se* approach to "hostile environment" claims will thus thwart the expectations of employers, based on *Meritor*, that their good-faith creation of policies and grievance procedures for self-remediation will be valued and weighed as a factor in Title VII enforcement, or that courts will evaluate the totality of the circumstances before finding liability. *Karibian* is predicated on a misapplication of agency rules which departs so significantly from *Meritor*, and differs so sharply from the more realistic standards adopted by other Circuits, as to present a jurisprudential issue meriting review by this Court.

In addition, the decision below creates other serious dilemmas arising from the conflicting demands of other laws.

For example, if an employer were automatically to be liable for a liaison between a supervisor and a subordinate which is later alleged (and ultimately found) to be unwelcome, employers might seek to minimize liability by discouraging all such relationships.[10]

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[10] These relationships can be particularly troublesome for colleges and universities, which are subject to the requirements of Title IX as well as Title VII. The relationships between students and faculty (and students and administrators) raise issues and concerns regarding the potential for sexual harassment not found in the traditional workplace.

However, some states, such as New York, prohibit employers from doing so.[11] In such a situation, an employer can now be put to a choice of regulating its employees' private lives lest their relationships intrude upon the workplace (and thus incurring possible liability for its own intrusion), or of disregarding the relationship (and incurring strict liability under the Second Circuit rule if it is later alleged and ultimately shown that the relationship was unwelcome). Both options present serious difficulties. It would be far more appropriate — and consistent with *Meritor* — to let the employer deal with the situation by maintaining a meaningful sexual harassment policy and procedure, and taking prompt, effective action when improper activity is observed or complained of.

For colleges and universities, the Second Circuit decision also escalates an existing tension between the goal of discouraging hostile environment harassment, and traditional values of academic freedom and free speech.[12] The argument can be made that a sexually (or racially, or religiously) hostile environment can be created through verbal expression, and may give rise to a claim under Title VII, Title IX, or Title VI.[13] At the same time, the educational community thrives on academic freedom, which must include both robust (and often sharp) debate, and the right to research, espouse and express unpopular ideas.

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[11] In New York, the "off-duty conduct statute" (New York Labor Law Section 201-d) is being used both by a discharged employee and by the State Attorney General to challenge a discharge based upon violation of a private employer's "no dating" rule for its employees. *See* Petition for a Writ of Certiorari at 15, n.9.

[12] *See Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

[13] Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000d, *et seq.* On March 10, 1994, the United States Department of Education published a notice of investigative guidance at 59 Fed. Reg. 11448 entitled *Racial Incidents and Harassment Against Students at Educational Institutions*, which sets forth its approach to on-campus racial incidents under Title VI, and expressly relies on sexual harassment and hostile environment precedent. *Id.* at 11449 and 11451, n.2.

Many in the academic community believe that a professor who adopts a provocative position with respect to gender, racial, ethnic or religious issues is entitled to the protections of academic freedom. Can that academic both enjoy individual protection for unpopular views *and* simultaneously create vicarious liability on the part of the university?[14] This difficult issue, while not now before the Court, exemplifies the painful dilemma which is created if an institution is forced to reconcile the tradition of academic freedom with the prospect of strict vicarious liability.

We submit that issues implicating academic freedom are uniquely well-suited to analysis through internal mechanisms within educational institutions, but that such analysis will be at least discouraged – if not potentially defeated – unless the Second Circuit ruling is modified to conform to the better-reasoned teaching of *Meritor*. Therefore, this Court should review the decision below and clearly disavow a strict liability rule.

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[14] *E.g.* "First Amendment Implications of Harassment Rules to be Studied," *The Chronicle of Higher Education*, April 27, 1994, p. A24, col. 1. In commenting on the Department of Education's approach (see note 13, *supra*), counsel for the American Council on Education has observed that the Government's definition of harassment "fails to distinguish between conduct that is primarily expressive, and thus is entitled to First Amendment protection, and conduct whose expressive content is incidental." *Ibid.* *See also* "A Sexual Harassment Case to Test Academic Freedom," *The New York Times*, May 11, 1994, p. D23, col. 1.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the Court grant the petition and issue a writ of *certiorari* to the Court of Appeals for the Second Circuit.

Dated: New York, New York
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